National Library
of Canada

Acquisitions and
Bibliographic Services Branch

395 Wellington Street
Ottawa, Ontario
K1A 0N4

Bibliothèque nationale
du Canada

Direction des acquisitions et
des services bibliographiques

395, rue Wellington
Ottawa (Ontario)
K1A 0N4

Your file Votre référence

Our file Notre référence

NOTICE

The quality of this microform is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Reproduction in full or in part of this microform is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30, and subsequent amendments.

AVIS

La qualité de cette microforme dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

La reproduction, même partielle, de cette microforme est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30, et ses amendements subséquents.

Canada

University of Alberta

Private Law and Public Virtue
A Philosophical Analysis of Contractual Obligation

by

©

Stephen Thomas Dare

Submitted to the Faculty of Graduate Studies and Research in Partial Fulfilment of the Requirements for the Degree of Doctor of Philosophy

Department of Philosophy

Edmonton, Alberta, Fall 1992

National Library
of Canada

Acquisitions and
Bibliographic Services Branch

395 Wellington Street
Ottawa, Ontario
K1A 0N4

Bibliothèque nationale
du Canada

Direction des acquisitions et
des services bibliographiques

395, rue Wellington
Ottawa (Ontario)
K1A 0N4

Your file Votre référence

Our file Notre référence

The author has granted an irrevocable non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of his/her thesis by any means and in any form or format, making this thesis available to interested persons.

L'auteur a accordé une licence irrévocable et non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de sa thèse de quelque manière et sous quelque forme que ce soit pour mettre des exemplaires de cette thèse à la disposition des personnes intéressées.

The author retains ownership of the copyright in his/her thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without his/her permission.

L'auteur conserve la propriété du droit d'auteur qui protège sa thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

ISBN 0-315-77378-2

Canada

University of Alberta

Release Form

Name of Author: Stephen Thomas Dare

Title of thesis: Private Law and Public Virtue: A Philosophical Analysis of Contractual Obligation

Degree: PhD

Year Degree Granted: 1992

Permission is hereby granted to the University of Alberta Library to reproduce single copies of this thesis and to lend or sell such copies for private, scholarly or scientific research purposes only.

The author reserves other publication rights, and neither the thesis nor extensive extracts from it may be prinited or otherwise reproduced without the author's written permission.

Stephen Thomas Dare
9 Monaghan Avenue
Karori
Wellington
New Zealand

Date: 19 october 1992

University of Alberta

Faculty of Graduate Studies and Research

The undersigned certify that they have read and recommend to the Faculty of Graduate Studies and Research for acceptance a thesis entitled 'Private Law and Public Virtue: A Philosophical Analysis of Contractual Obligation' submitted by Stephen Thomas Dare in partial fulfilment of the requirements for the degree of Doctor of Philosophy.

Roger A. Shiner

....
Roger A. Shiner
(Supervisor)

Wesley E. C

....
Wesley E. Cooper

Brenda M. Baker

....
Brenda M. Baker

Bruce Hunter

....
Bruce A. Hunter

David R. Percy

....
David R. Percy

....
Jeremy J. Waldron
(External Examiner)

Date: 1 October 1992

Abstract

According to some approaches to contract law, the criteria by which the existence and extent of contractual obligation is to be determined reside within the act of contracting itself. Such approaches are *internalist* and *content-independent*. Other approaches claim that contractual obligation arises only where the content of a contract is consistent with a principle of contractual obligation which stands independently of and prior to particular contracts. Such approaches are *content-dependent* and *externalist*. The principal theories of contract are either internalist and content-independent or externalist and content-dependent.

This thesis is concerned to argue that externalist content-dependent theories of contract are implausible. It is argued that contract should be conceived of as a *modus vivendi*: The criteria for the determination of contractual obligation are to be specified by communities as a way settling issues which they would settle by appeal to external content-dependent standards if they could, but which they settle by internal content-independent standards because that is the only option available to them.

Once the status of contract as a *modus vivendi* is appreciated, we can see that many of the specific criticisms of internalist content-independent accounts of contract can be met. One such criticism claims that internalist content-independent accounts cannot recognise the importance of the externalist concerns which are at issue in contractual adjudication. But the conception of contract as a *modus vivendi* is able to recognise the significance of such concerns, while retaining its status as internalist and content-independent. An immediate consequence of this feature of the conception is that it at once disarms many of the critics of internalist accounts of contract and removes much of the motivation for their critique.

A number of leading theories of contract are examined in light of the distinction between internalist content-independent and externalist content-dependent conceptions of contract and the idea of contract as a *modus vivendi*. These perspectives show those theories to be inadequate. Though many common criticisms of will theory are misplaced, the theory relies upon an account of contractual language which cannot be sustained. Randy Barnett's consent theory of contract has much in common with the account of contract defended in this study, but Barnett ends up relying too directly upon a underlying moral theory, so that this account is ultimately vulnerable to the same objection both he and this study run against externalist theories. Similarly Charles Fried's defence of the promise theory of contract relies directly upon a particular moral theory for which Fried does not argue. Patrick Atiyah's admissions theory of promise is externalist and content-dependent, but in order to meet objections to his theory based upon features of contract doctrine, Atiyah resorts to a number of arguments which in fact undercut his own position: they are arguments for an internalist content-independent account of contract.

The study, then, is concerned to present an account of contract as a *modus vivendi* and to show how that account allows us to satisfy both our belief in the importance of externalist concerns in determinations of contractual obligation and our need to make such determinations given that we cannot do so by direct appeal to such externalist concerns.

Table of Contents

Abstract iv

Index of Cases vi

Chapter One

The Liberal Conception of Contract and Its Critics - An Overview 1

Chapter Two

Contract Theories - Types and Tokens 38

Chapter Three

Randy Barnett's Alternative Taxonomy 75

Chapter Four

Anthony Kronman and Contract Theory Types 85

Chapter Five

Substantive and Procedural Approaches 110

Chapter Six

The Will Theory of Contract 132

Chapter Seven

Contract and Consent 165

Chapter Eight

Contract and Promise 187

Chapter Nine

Contract as a Modus Vivendi - A Review 233

Bibliography 270

Index of Cases

Anon (1477) YB 17 Edw 4, fol 1, pl2 138

Atlas Express Ltd v *Kafco* [1989] 1 QB 833 8

Bell v *Lever Brothers Ltd* [1932] AC 161 .... 16, 19, 21

BML Corp v Greater Providence Deposit Corp 495 A2d 675 (RI 1985) 78

Bolton v *Madden* (1873) LR 9 QB 55 56

British Westinghouse Electric and Manufacturing Co v Underground Electrical Railways Co [1912] AC 673 (HL) 5

Chappell & Co. Ltd v *Nestle Co Ltd* [1960] AC 87 (HL) 57

Cox v *Troy* (1822) 5 B & Ald 474, 480; 106 Eng Rep 1264 180

Crabb v *Arun District Council* [1975] Ch 179; [1975] 3 All ER 865 .... 7, 60, 209

Cundy v *Lindsay* (1873) 3 App Cas 459 138

Davis Contractors Ltd v *Fareham Urban District Council* 1956] AC 696 6

Dickinson v *Dodds* (1876) 2 ChD 463 138

First National Exchange Bank of Roanoke v *Roanoke Oil Co* 169 Va 99, 114 192 SE 45

Fischer v *Union Trust Co* 138 Mich 612, 101 NW 852 (1904) 57

Foster v *Wheeler* (1887) 36 Ch.D. 695 180

Griffith v *Brymer* (1903) 19 TLR 434 192

Grist v *Baily* [1967] Ch 532 21

Harrison v *Cage* (1698) 12 Mod 214 64

Hart v *O'Conner* [1985] AC 1000; [1985] 1 NZLR 159 15, 16, 19, 33, 69

Haynes v *Haynes* (1869) 1 Dr & Sm 426; 62 ER 442 75, 137, 138

Hoffman v *Red Owl Stores, Inc* 26 Wis 2d 683, 133 NW 2d 267 (1965) 7, 198, 209

Inche Noriah v *Shaik Allie Bin Omar* [1929] AC 127 15

Ivanchoko v *Sych* (1967) 58 WWR 633 21

Joscelin v *Shelton* (1557) 3 Leon 4 64

Kennedy v *Lee* (1817) 3 Mer 441 138

Krell v *Henry* [1903] 2 KB 740 192

Leaf v *International Galleries* [1950] 2 KB 86 20

Lloyds Bank v *Bundy*[1975] QB 326; [1974] 3 All ER 757 17

Macrae v *Commonwealth Disposals Commission* (1951) 84 CLR 377 21

Magee v *Pennine Insurance Co Ltd* [1969] 2 QB 507 21

Manchester Sheffield and Lincolnshire Railway Co v *Brown* (1883) 8 App Cas 703, 718-719 (HL.E) 33

Manwood v *Burston* (1586) 2 Leon 203 64

Morrison v *Burton* (1955) 15 WWR 667 16

North Ocean Shipping Co Ltd v *Hyundai Construction Co Ltd* [1979] QB 705 8

O'Connor v *Hart* (Unreported, May 17 1982, High Court of New Zealand, Timaru Registry, A29/80) 18, 19

O'Connor v *Hart* [1983] NZLR 280 (CA) 18, 19

Pao On v *Lau Yiu Long* [1980] AC 614 8, 15

Paradine v *Jane* (1647) Aleyn 26; 82 ER 897 193

Pecke v *Redman* (1555) 1 Dyer 113 64

Peeters v *Schimanski* [1975] 2 NZLR 238 16

Pole v *Leask* (1863) 33 LJ Ch 155 138

Printing and Numerical Registering Co v *Sampson* (1875) LR 19 Eq 462 .... 3, 242

Raffles v *Wichelhaus* [1864] 2 H & C 906; 159 ER 375 192

Roscorla v *Thomas* (1843) 3 QB 234 58

Rowe v *Turner, Hopkins, & Partners* [1982] 1 NZLR 178 148

Smith v *Hughes* (1871) LR 6 QB 597 .... 43, 168

Stees v *Leonard* 20 Minn 494, 530 (1874) 193

Stilk v Myrick (1809) 2 Camp 317; 170 ER 1168 .... 8, 209

Taylor v *Caldwell* (1863) 3 B&S 826; 122 ER 309 193

Thierry v *Thierry* (1956) 2 DLR (2d) 419, 425 (Sask CA) 138

Thomas v *Thomas* (1842) 2 QB 851, 114 Eng Rep 330 57

Waring v *S J Brentnall Ltd* [1975] 2 NZLR 401 21

Webb v *McGowan* 27 Ala App 82, 168 So 196 (1935) 58

Williams v *Roffey Bros & Nicholls (Contractors Ltd)* [1990] 1 All ER 512 8

Chapter One

The Liberal Conception of Contract and its Critics - An Overview

The institution of contract law, one might think, should be the flagship of liberal individualism. Much of the political and moral philosophy of liberal individualism is founded upon appeals, of varying degrees of directness, to the idea of contract.[1] The explanation for these appeals seems straightforward enough: contract seems to allow us to explain how individuals might retain their status as free, choosing, rational planners - might retain, that is, those features liberal individualism supposes them to possess - while at the same time taking on obligations which limit their freedom, and the range of choices and plans available to them, so as to make community with similarly constituted individuals possible. Contractarian moral and political philosophy appeals to contract because contract seems to allow both obligation and respect for individual liberty. Limitations upon personal freedom are consistent with individual liberty when they arise precisely from the exercise of that liberty. The assumption here is that free, choosing, rational planners, will choose obligations which promote, or are at least consistent with, their conception of the good life. To respect those choices just *is* to respect their conception of the good and their strategies for its attainment.

---

[1] Primary sources include, David Hume *A Treatise of Human Nature* (Clarendon Press; Oxford, 1978), John Locke *Two Treatises on Government* (New American Library; New York, 1965), Thomas Hobbes *Leviathan* (Penguin Books; Harmondsworth, 1968), John Rawls *A Theory of Justice* (Harvard University Press; Cambridge, Mass., 1971), Jean-Jacques Rosseau *The Social Contract* (Penguin Books; Harmondsworth, 1968)

The upshot is that contractarian moral and political philosophy seems to be explained by the perceived individualism of contract - contract is taken here to *just be* liberal and individualist. If this is true, we might expect these properties which attract liberal individualists to the idea of contract, to be especially clearly instantiated in contract law itself. If the contractarian's perception of contract is to be true anywhere, it had better be true in an institution which concerns itself precisely with contractual obligation. Contractarians claim that moral and political obligation can be derived from the idea of contract. But at best their efforts are on the penumbra of the subject matter of contract law - typically both the existence and the terms of the contracts to which contractarians appeal are to be settled by reference to speculations and presumptions about the paths down which reason will lead the contracting parties. Though contract law is by no means entirely free from such presumptions and speculations, it can for the most part direct its arguments to contracts the existence and terms of which are easily evidenced. Here then, one might suppose, there is unconstrained opportunity for the true nature of contract to out.

The *liberal conception* of contract law is a vindication of these intuitions of contractarianism. Contract law is an institution, according to this conception, the *raison d'etre* of which is the provision of opportunity for individuals to pursue voluntary choices. Contract so conceived springs fully formed from the loins of the liberal state - a state committed to neutrality as between conceptions of the good life, and intent upon maximising the liberty of its citizens insofar as an equal claim to such liberty by all allows. The law of contract serves these liberal goals by facilitating the creation of legal obligations on any terms voluntarily chosen by individuals. Its various doctrines and rules are united in their common derivation from the view that individual liberty is to be given priority. Sir George Jessel MR acted as spokesman for the view when he insisted in an oft quoted passage that "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."[2] The event which gives rise to and determines the content of contractual obligation on this picture, is the individual's choice to enter into legal relations with another on specified terms. Contract law so perceived marks off a sphere of self-imposed obligations which are to be distinguished from the other-imposed obligations to be found in those legal institutions concerned to ensure compliance with the community's views as to how and to what end relations between individuals should be ordered.

If this sketch of the connection between liberal individualism and the institution of contract is plausible, it should be of at least some concern to that ideology that the liberal conception of contract law has been under persistent attack for at least half a century. That attack has been multi-pronged, and no attempt will be made to present all its facets in these introductory remarks. Nonetheless it may be useful to have a least a sketch of the opposition to the liberal conception of contract, and to this end we will usefully set out a number of strands of that opposition.

---

[2] *Printing and Numerical Registering Co.* v *Sampson* (1875) LR 19 Eq 462, 465

Some strands have been concerned to show the liberal conception to be descriptively inadequate. They have claimed that there are features of the actual law of contract which cannot be accounted for by, or which at least raise difficulties for, the liberal conception of contract. We will usefully set out some examples of this strand of the critique.

The first example is a cluster of problems to do with the remedies available for breach of contract. We can start with the idea that if contractual obligation rests upon an individual's choice to enter into legal relations with another on specified terms, as the liberal conception asserts, then , it might seem, the primary remedy for breach of contract should be an order requiring the defaulting party to fulfil their undertaking - to do as they have contracted to do. If the liberal conception of contract were an accurate account of legal practice, one might think, *specific performance* should be the primary remedy for breach of contract. In fact however, specific performance is an extraordinary remedy in contract. The standard remedy is an order for *expectation damages*. A successful plaintiff in an action for breach of contract will typically be entitled not to that contractually undertaken, but to such financial compensation as is necessary to place her in the position she would have been in had the contract been properly performed.[3] The significance of this fact for the liberal conception has been suggested in striking fashion by Guido Calabresi and Douglas Melamed.[4] According to these authors, some legal entitlements are protected by *property* rules while others are protected by *liability* rules. Those protected by property rules may be appropriated by a nonowner only with the prior consent of the owner. Nonconsensual appropriations of such entitlements are always subject to a special sanction - typically a fine or imprisonment. Entitlements protected by liability rules, by contrast, may be nonconsensually appropriated, subject only to an obligation to compensate the owner, retrospectively, for any loss suffered by the owner as a result of the appropriation. The quantum of compensation to be paid for the appropriation of an entitlement protected by a liability rule is settled by an agent of the state, rather than by the owner of the entitlement in a voluntary transaction between the owner and the taker. Voluntariness, at the heart of the liberal conception of contract, is irrelevant in the transfer of entitlements protected by liability rules. The difficulty posed for the liberal conception by the rule which renders expectation damages rather than specific performance the primary remedy in contract, is that that rule seems to have the effect of protecting rights under contract by liability rather than property rules. The rule, then, seems inconsistent with the liberal conception's commitment to the centrality of voluntariness to contract.

---

[3] The primacy of damages rather than specific performance, led Holmes to conclude that there was in fact no general obligation to *perform* contractual undertakings at all: "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free ... to break his contract if he chooses." O.W. Holmes Jnr *The Common Law* (London; MacMillan, 1882) 300.

[4] Guido Calabresi and Douglas Melamed 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089, see especially 1092. Calabresi and Melamed do not apply their analysis to contract. For such an application and a liberal response to the difficulty identified in the text, see Anthony Kronman 'Specific Performance' (1978) *University of Chicago Law Review* 351.

A second element of this cluster is the doctrine of mitigation. The effect of this doctrine is to limit even further the extent to which the victim of a contractual breach can demand that for which she has contracted. The principle that a successful plaintiff is to be restored, albeit by a substitutory remedy of financial damages, to the position she would have occupied had the contract been properly performed, "is qualified by a second [principle] which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach ...."[5] This will require, at the very least, that the plaintiff avail herself of substitute or near substitute performance where possible. Provided that such performance is available, the cost of default will be limited to the difference (if any) between the cost of substitute performance and the cost of proper performance. To see how this doctrine troubles the liberal conception, we need only ask whether a person who says "I promise I will paint your house, starting January 1, for $5,000.00" has promised:

a) to paint the promisee's house, starting January 1, for $5,000.00

or

b) to *either*

i) paint the promisee's house, starting January 1, for $5,000.00

or

ii) pay the promisee the difference between $5,000.00 and the cost of having someone else paint the promisee's house, starting January 1.

The effect of the doctrine of mitigation is that contractual promisors are taken to have promised b) rather than a). But this is to say that the obligations created by contractual promises are not obligations to perform the promised act. As for the obligations they do create, a significant portion of those which rest upon the promisor obtain *independently* of the voluntary consent of the disappointed promisee, who must simply take substitute performance, in effect at the election of the defaulting party, or forgo even the substituted performance offered under the principle which requires her to take expectation damages rather than performance at the outset. And further, the doctrine of mitigation has the effect of placing *positive duties* upon successful plaintiffs: no matter that they have voluntarily entered into a bargain for *y*, they find themselves obliged upon their co-contractor's breach to go out and find as good a substitute for *y* as they reasonably can.

---

[5] *British Westinghouse Electric and Manufacturing Co.* v *Underground Electrical Railways Co.* [1912] AC 673, 689 (HL), per Lord Haldane LC.

A third element of this cluster of remedies-related features of contract which seem to trouble the liberal conception can usefully be dated to a landmark article by Fuller and Perdue, in which they argued that at least a good deal of what courts were doing in contract cases had to be explained on the basis that the courts were concerned not to give effect to the free choices of contracting parties, but instead to protect those who had relied to their detriment upon another's statement, or promise, or undertaking.[6] The foundation of contractual obligation, according to this reliance model of contract, was to be found not in respect for the status of contracting parties as free, choosing, rational planners, but in the community's desire to compensate those who had suffered as a result of their reasonable reliance upon the undertakings of others. This approach gives a quite distinct account of contract from that promoted by liberal individualism. As a matter of legal practice, it leads, in its positive manifestation, to a willingness to impose obligation for reliance upon 'noncontractual' undertakings, and, in its negative manifestation, to an unwillingness to award damages beyond that figure necessary for full compensation. Neither manifestation sits well with the liberal conception of contract. On the one hand, if contractual obligation rests simply upon the contract, then no obligation should arise from reliance upon noncontractual undertakings, and on the other, a successful plaintiff ought to be able to receive in damages what the other party has contracted to give her, not simply what she has lost in reliance upon the other party's contractual undertakings.

---

[6] Lon L Fuller and William R Perdue 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 52 (part 1)& 373 (part 2). See as well *Crabb* v *Arun District Council* [1976] Ch 179; [1975] 3 All ER 865, and *Hoffman* v *Red Owl Stores, Inc* 26 Wis 2d 683, 133 NW 267 (1965).

The further example of the assertion that the liberal conception of contract is descriptively inadequate points to the doctrine of consideration. It seems likely that this doctrine has changed considerably since its very early emergence into the law of contract. At one point, 'consideration' appears to have meant something akin to 'reason' or 'motive'.[7] Here the doctrine which rendered an undertaking for which there was no consideration unenforceable in contract, said that unless there was some discernible reason or motive for the giving of the undertaking, the law would take the view that it cannot have been seriously intended. Enforcement was withheld because of doubts about the intention of the promisor. On this reading the doctrine seems consistent with the liberal conception of contract: in order to respect the free choices of moral agents we must first determine what those choices are, and consideration, in the reason or motive sense, may seem to go to such determination.[8] Nowadays, however, consideration is typically understood in rather different terms, as a corollary of the bargain theory of contract. According to this view, the law of contract is designed to enforce bargains -

---

[7] A.W.B Simpson *A History of the Common Law of Contract* (Oxford University Press; Oxford, 1975) 457

[8] I do not mean to suggest here that this is the *only* account of consideration which renders that doctrine consistent with the liberal conception of contract. According to one standard story the function of the doctrine is to prevent extortion in cases of contractual variation: If I am already contractually obliged to sail your boat to England, the promise of more pay for the same service which I extract from you by threatening to breach the original contract will be void for lack of consideration - I am giving you nothing I am not already obliged to give you, so provide no consideration. See *Stilk v Myrick* (1809) 2 Camp 317; 170 ER 1168. The account, it must be said, suffers its own defects. In particular, it is difficult to see how it justifies a *general* doctrine of consideration rather than a specific invalidation of extorted variations. The nascent doctrine of economic duress which appears to be replacing the doctrine of consideration in many cases, can be seen as this more specific response. See *North Ocean Shipping Co Ltd* v *Hyundai Construction Co Ltd* [1979] QB 705; *Pao On* v *Lau Yiu Long* [1980] AC 614; *Atlas Express Ltd* v *Kafco* [1989] 1 QB 833; and *Williams* v *Roffey Bros & Nicholls (Contractors Ltd* [1990] 1 All ER 512.

arrangements in which the act or undertaking of one party is 'bought' or 'bargained for' by the act or undertaking of the other party. Consideration is the price paid for the act or undertaking of the other party. Where no price is paid, as in the case of an undertaking to make a gift, there is no consideration, and so no contract. It is clear enough why this, now standard, formulation of the doctrine of consideration seems to trouble the liberal conception of contract: for it seems here that it will not be enough that a contract has resulted from the free choices of agents of the appropriate type. Procedural considerations will not settle the matter. For surely 'agents of the appropriate type' can make undertakings to make gifts. When contract excludes such undertakings from its realm, it seems to say that its foundation is not a commitment to respect the choices of such agents, for it has in the gift case just such a choice which it will not enforce. The foundation of contract then must be something else - perhaps a commitment to promote efficient exchanges (where gifts as a class are taken to be, or to be highly likely to be, inefficient), or a commitment to prevent the harm or loss involved in cases in which one party has paid for a reneged promise (which harm or loss is taken to be absent when the reneged promise was merely donative). Whatever the something else is, however, the presence of the doctrine of consideration in the actual law of contract is commonly taken to show that the liberal conception of contract cannot be right. The conception is descriptively inadequate, since the law of contract we have, containing as it does the doctrine of consideration, is not the law of contract we would have were contract really founded upon the liberal conception.

The talk of harm and compensation in the discussion so far allows us appreciate the point of another strand of the critique of liberal contract theory.

At least since Grant Gilmore's *The Death of Contract,*[9] liberal contract theory has been portrayed as primarily concerned to resist the assimilation of contract to tort. The idea here is that torts is that area of the law which is specifically concerned with compensation for harm caused by the wrongful act of another - with compensation for physical harm caused by willful or negligent conduct, for pecuniary harm caused by careless or deceitful statements, for injury to reputation caused by untrue statements. To the extent that the reliance theory of contract is accurate, so that contract law is primarily concerned to compensate for harm, or that the only way to make a law of contract which contains a doctrine of consideration coherent is to portray it as similarly concerned, it seems that the distinction between contract and tort will be significantly reduced. Each will be concerned with the provision of compensation for harm.

The significance of this diagnosis lies in the nature of tortious liability. In our preliminary sketch of the conception of contract law which seems to derive most directly from the ideology of liberal individualism, we referred to that conception's insistence upon a sharp distinction between self-imposed and other-imposed obligation. The assimilation of contract to tort threatens this distinction. For tortious liability seems to arise "from a breach of a duty *primarily fixed by law....*"[10] The originator of this definition took this feature of tort to distinguish it from contract. Contractual obligation, he maintained, could not arise other than as a result of the will or intention of the parties, arising from a breach of a duty fixed by the parties. Later editors of *Winfield on Tort*, influenced by the critique of that version of the liberal conception of contract which emphasised the will of the parties,[11] have suggested that the distinction between the two grounds of liability is better stated "in the proposition that in tort the content of duties is fixed by the law whereas the content of contractual duties is fixed by the contract itself."[12] Whether we prefer Winfield or his editors we can see why Gilmore would describe the assimilation of contract to tort as 'the death of contract'. It is the death of the liberal conception of contract. Not only is contract to be portrayed, like tort, as concerned with the provision of compensation for harm, but harm is to be understood in terms of duties set not by the parties, but by public or collective norms. On the account of tort which both Winfield and his editors favour, the duties to be enforced are imposed upon the parties by the law. The function of the courts in tort adjudication is to identify and protect not the free choices of the parties, but rather the values of the community which, through the law, are to be imposed upon the parties regardless of their choice. In adjudicating tort claims, courts are concerned to impose the communities' standards as to what counts as the proper amount of care in our dealings with one another. They are certainly not concerned with imposing standards which the parties have chosen to govern their interaction, since that interaction is, from at least one party's point of view, involuntary. The parties do not interact as free, choosing, rational planners, and the adjudication of their dispute cannot appeal to standards they have put in place in the manifestation of their status as such agents. To the extent that the critics of liberal contract theory seek to assimilate contract to tort, either directly or by portraying contract as concerned to compensate for harms, then, they deny the status of contractual obligation as springing uniquely from the choices of contractual parties. The assimilation of contract to tort threatens to destroy the distinction between voluntarily assumed and collectively imposed obligations which the liberal conception of contract holds sacred.

---

[9] Grant Gilmore *The Death of Contract* (Ohio State University Press, Columbus, 1974)

[10] The phrase, with emphasis added, is taken from Winfield's well-known definition: "Tortious liability arises from the breach of a duty primarily fixed by the law: this duty is toward persons generally and its breach is redressable by an action for unliquidated damages."*Winfield on Tort* (Sweet and Maxwell: London, 1937)

---

[11] We will explore this critique in more detail in Chapter Six below.

[12] *Winfield and Jolowicz on Tort (9th ed)* (eds; Jolowicz, Ellis Lewis, and Harris) (Sweet and Maxwell, London, 1971) 12

Another, more general, strand to the claim that the liberal conception of contract is descriptively inadequate is usefully seen as a species of the realist criticism of *formalist* theories of law. A formalist theory, for the purposes of this criticism, is taken to be one which conceives of law as a system of rules, and which believes that such rules function to limit the exercise of judicial discretion. The liberal conception of contract is supposed to be such a theory. The idea here is that the liberal conception believes that the status of persons as free, choosing, rational planners, will be respected and fostered most effectively within a system of rules. The principal feature of rule-systems which is taken to make this true is their capacity to promote certainty. If judges settle cases, and so the law, according to their own discretion, citizens cannot know what the law is in advance of judicial decisions. They cannot know which choices and plans will receive judicial protection. Such circumstances inhibit the exercise of the capacity for rational choice, since actors are unable to plan around settled and public laws. Duncan Kennedy makes the point when he writes that "if private actors can know in advance the incidence of official intervention, they will adjust their activities accordingly. From the point of view of the citizenry, [this] removes the inhibiting effect on action that occurs when one's gains are subject to sporadic legal catastrophe."[13] It is impossible to develop and pursue a maximising strategy if the referee keeps changing her mind about what is and is not allowed.

---

[13] Duncan Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685, 1688

The idea, then, is that rules, by virtue of their contribution to certainty, create circumstances which favour the exercise of the capacity for rational choice. Since the liberal conception of law values the exercise of this capacity, it is committed to, or at least favours, a conception of law as a system of rules. The legal realists claimed, in short, that legal doctrine inevitably contained conflicting rules, so that judges always had a choice between inconsistent rules in their determination of cases. Given this, the claim went, the certainty promised by the conception of law as a system of rules was a chimera.[14] The realist's perception was that the presence of conflicting rules in legal doctrine always gave judges a choice in the disposition of cases. Adjudication, on this account, was at the very least, a much less rule-governed affair than previous legal theorists had supposed. To the extent that contract doctrine bears out the realist's analysis, to the extent, that is, that contract law is the repository of conflicting rules and doctrines, doubt may be thought to be cast upon the descriptive accuracy of the liberal conception of contract law.

In fact it seems clear that contract law does contain conflicting and contradictory rules and doctrines. Before turning to some specific instances of such conflicts, it will be useful to set out just how they might be thought to arise. Much of the discussion so far can be understood as a brief survey of some institutional manifestations of two competing views as to the nature and source of contractual obligation. The liberal conception is motivated by a desire to protect the free choices of persons. Contractual obligation, on this account, turns upon voluntariness. If parties have voluntarily entered into a contract, they are bound by its terms - the courts are bound to find contractual obligation. No assessment is to made here as to the consistency of the contents of the contract with some independent standard of a fairness in exchange. The liberal conception gives an *internalist* and *content-independent* account of contractual obligation. According to the critique however, contractual obligation is dependent precisely upon the consistency of the content of the contract with some such external standard of fairness in exchange. If we think, *pace* Sir George Jessel MR,[15] that what public policy really requires is that benefits and burdens are to distributed among the members of a community equally, or according to need, or the like, we may be prepared to refuse to enforce contracts the contents of which do not respect this policy, even when they have been entered into quite voluntarily.[16] In doing so we would ask whether the content of the contract was consistent with our principle of equal distribution or distribution according to need.[17] Here the account of contractual obligation is *externalist* and *content-dependent*.[18]

---

[14] "[I]f there is a competing but equally authoritative premise that leads to a different conclusion - then there is a choice in the case; a choice to be justified; a choice which *can* be justified only as a matter of policy - for the tradition speaks with a forked tongue." Karl Llewellyn 'Some Realism about Realism' (1931) *Harvard Law Review'* 1222, 1252. See also John Dewey 'Logic, Method, and Law' (1924) 10 *Cornell Law Quarterly* 17

Another way to present this distinction between views as to the nature and source of contractual obligation is to say that according to the critique of the liberal conception, contractual obligation is not founded solely upon the contract between the parties. Rather, the existence and content of contractual obligation will depend upon the consistency of a contract with some *external* standard which stipulates how and to what end relations between individuals are to be ordered. By contrast, the liberal conception purports to find the criteria by which to identify the existence and content of contractual obligation within contracts themselves. Contractual obligation does not obtain and cannot arise independently of actual and specific contracts. Contractual obligation is taken here to be specifically and uniquely contractual. Michael Sandel distinguishes between alternative views of justice in contract in these terms when he writes that:

---

[15] Supra fn 2

[16] For example: "The classical law emphasizes the importance of consent to an agreement out of fidelity to its concern for individual liberty .... In modern society, however, we cannot accept personal autonomy as such a pre-emptive value in legal reasoning. Another principle which demands respect for the interests of others often qualifies our concern for individual liberty." Hugh Collins *The Law of Contract* (Weidenfeld and Nicholson; London, 1986) 52-53

[17] Anthony Kronman, for example, is concerned to argue for the inevitability of such a conception of contract in his influential paper 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472. We will examine Kronman's argument in detail in Chapter Four below.

[18] For the idea of content dependence and content independence, see H.L.A. Hart 'Legal and Moral Obligation' in *Essays on Moral Philosophy* ed. Melden (Seattle, 1958)

> Where [one view] points to the contract itself as the source of obligation, [the other] points *through* the contract to an antecedent moral requirement to abide by fair arrangements, and thus implies an independent moral principle by which the fairness of an exchange may be assessed.[19]

If it is true that these competing ideas of the nature and source of contractual obligation have influenced the institution of contract, we should expect the realist's analysis to be vindicated - the law of contract will contain conflicting rules and doctrines. We can limit attention to the contractual defences in order to test this supposition. Given the nature of the two views, the contractual defences flowing from the liberal conception of contract should relate to contracts themselves with a special regard to voluntariness, while those flowing from the critique should relate to the content of agreements and their consistency with external standards of fairness and justice in exchange. To a large extent the contractual defences do bear out the realist analysis.

From the perspective of the liberal conception, the recognition of duress[20], misrepresentation, and, under certain construals, unconscionability[21] and undue influence[22], as contractual defences, is to be explained by the fact that they are available where the entry of the offeree into the contract was due to coercion by the offeror, or to misinformation for which the offeror was responsible. In all of these cases, the defences appeal to factors which go to the voluntariness of the contract - or, to put the matter more generally, to the process by which the contract was created - rather than to the fairness of the exchange under the contract. Similarly, the liberal conception allows the defences of mental disorder,[23] infancy,[24] and intoxication,[25] where the effect of these states upon those raising them is that they did not voluntarily enter into the contract. Again attention is directed to the conditions under which the contract was made, rather than to its content. The account would allow the defences of mistake[26] and frustration[27], where the effect of these phenomena is to present the courts with a contract to which one or both the parties have not agreed. Again the defence is concerned not with the 'fairness' of the exchange under the contract, but with whether the parties agreed to that exchange. The defence is justified on *procedural* rather than *substantive* grounds. The defences look to the procedure by which contracts come into being with an eye to determining their voluntariness, rather than to the content or substance of contracts with an eye to determining the consistency of that content with an external standard of justice of fairness in exchange.

---

[19] Michael Sandel *Liberalism and the Limits of Justice* (Cambridge University Press; Cambridge, 1982) 107

[20] "Duress, whatever form it takes, is a coercion of the will so as to vitiate consent." *Pao On* v *Lau Yiu Long* [1980] AC 614, 635

---

[21] "Their Lordships have not been referred to any authority that a Court of Equity would restrain a suit at law where there was no victimisation, no taking advantage of another's weakness, and the sole allegation was contractual imbalance with no undertones of constructive fraud." *Hart* v *O'Conner* [1985] AC 1000, 1024; [1985] 1 NZLR 159, 171 (per Lord Brightman for the PC on an appeal from the New Zealand Court of Appeal). For academic defences of a procedural construal of unconscionability, see Richard Epstein 'Unconscionability: A Critical Reappraisal' (1975) 18 *Journal of Law and Economics* 293, and Leff 'Unconscionability and the Code - The Emperor's New Clause' (1967) 115 *University of Pennsylvania Law Review* 485.

[22] So that a claim of undue influence will be met if evidence can be adduced to show that the contract was the act of a 'free and independent mind'; ..."[i]t is necessary for the donee to prove that the gift was the result of the free exercise of independent will." *Inche Noriah* v *Shaik Allie Bin Omar* [1929] AC 127, 135

[23] "If a contract is stigmatised as unfair, it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was bought into existence; a contract induced by undue influence is unfair in this sense. It may also, in some contexts, be described ... as 'unfair by reason of the fact that the terms of the contract are more favourable to one party than the other. In order to distinguish this 'unfairness' from procedural unfairness, it will be convenient to call it contractual imbalance.... In the opinion of their Lordships, to accept the proposition ... that a contract with a person ostensibly sane but actually of unsound mind can be set aside because it is 'unfair' to the person of unsound mind in the sense of contractual imbalance, is unsupported by authority, [and] is illogical ...." *Hart* v *O'Conner* [1985] AC 1000, 1017-1018; [1985] 1 NZLR 159, 166 (PC) Per Lord Brightman

[24] "Since a contract is an agreement ..., and involves the idea of consent, only those who have the power to consent can contract. This excludes those considered as lacking such power through being under the age of majority or through having a disordered mind." GHL Fridman *The Law of Contract in Canada* (2nd Ed) (Carswell; Toronto, Calgary, Vancouver, 1986) 126

[25] "It may be that extreme intoxication will so deprive a person of his reason as to render his consent void .... Where drunkeness is not such as to deprive a party of his reason, but merely of his business sense, the contract is at most voidable." 9 *Halsbury's Laws of England* (4th ed) para. 299. Approved in *Peeters* v *Schimanski* [1975] 2 NZLR 238, 335 (CA) per Cooke J.

From the perspective of the critique however, we obtain a different account of the grounding of the contractual defences. In *Lloyd's Bank* v *Bundy*[28] Lord Denning MR, sought to assimilate the defences of duress, undue influence and unconscionability under the single principle 'inequality of bargaining power', explaining the nature of the cluster of defences so:

> ... English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grieviously impaired by reason of his

---

[26] "If mistake operates at all it operates to negative or in some cases to nullify consent." *Bell* v *Lever Brothers Ltd* [1932] AC 161, 217, per Lord Atkin (HL); "The law is clear that under certain circumstances mistake may exclude real consent; if each party meant some definite thing but not the same as thing as the other party meant, their minds never met.... While contracts attempted to be made under such circumstances are sometimes said to be vitiated by 'fundamental error', in reality that which prevents the contract being formed is not the existence of error but the nonexistence of true consent." *Morrison* v *Burton* (1955) 15 WWR 667, 671, per Egbert J.. And see generally Chapter Seven of Fridman, supra fn 24, for an argument that the approach should be followed in all versions of mistake.

[27] ... [F]rustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It is not this that I promised to do." *Davis Contractors Ltd* v *Fareham Urban District Council* [1956] AC 696, 729, per Lord Radcliffe.

[28] [1975] QB 326; [1974] 3 All ER 757

> own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures bought to bear on him by or for the benefit of the other.[29]

Some of the language in this passage has a decidedly proceduralist ring; the talk of the importance of independent advice, of the role of undue influence or pressure, indeed the gathering the cluster of defences under the rubric 'inequality of bargaining power', might all seem to direct attention to the circumstances in which the contract came into being. Other factors - in particular the reference to the fairness of the terms of the contract, and to the adequacy of the consideration - seem to evidence a substantivist approach. A clear suggestion that Lord Denning intends to give priority to the latter is found in the qualifications he makes to the ostensibly proceduralist notions noted. He goes on to say this:

> When I use the word 'undue' I do not mean to suggest that the principle depends upon proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal.[30]

The New Zealand courts have recently provided an illustration of the substantivist account of the defence of mental disorder. Jack O'Connor was 83 and suffering from senile dementia. Hart[31] bought O'Connor's farm. At the time of the contract Hart did not know of O'Connor's lack of capacity. The agreement provided that the purchase price of the farm should be its market value as at possession date, September 1 1977, though the price was not to be paid for two years. No deposit was payable and the vendor was to remain liable for rates and insurance until the purchase price was paid, but interest was payable on the outstanding amount at 11 per cent per annum. O'Connor and his two younger brothers were entitled to occupy their houses on the farm until their deaths. One of the brothers and his two sons sought to have the contract set aside for want of mental capacity, unfairness and unconscionability.

---

[29] [1975] QB 326 at 339; [1974] 3 All ER 757 at 765

[30] Ibid

[31] No relation

It was held at first instance,[32] and in the Court of Appeal,[33] that a contract entered into with a person of unsound mind was voidable if it could be shown either that the other party knew of the mental disorder, *or,* whether or not he had that knowledge, that the content of the contract was unfair to the person suffering the mental disability. The second option here is a purely substantivist approach to the defence of mental disorder. It justifies the defence by reference to the *content* of the contract rather than by the process by which it was created.[34]

The substantivist approach to contractual defences is also illustrated by the defence of mistake. Mistake is to be counted as a defence from the perspective of the liberal conception because it "negates or nullifies consent".[35] From the perspective of the critique it is an equitable doctrine which looks to the content of the contract between the parties. The two approaches are evident in the remarkably convoluted doctrine of mistake, in the distinction between a mistake as to the *identity* of the subject matter of the contract, for which a remedy may be obtained, and a mistake as the the *quality* of that subject matter for which no remedy may be obtained. The idea is that to enforce a contract in the first case would be to hold the parties to a contract to which they have not consented - they simply have not been contracting over the same subject matter. Here the mistake goes to the conditions in which the contract was made. In the second case, the parties are taken to have consented to the contract - they are contracting over the same subject matter - though one of them is disappointed as to its quality. Here the mistake goes to the content of the contract.[36]

---

[32] *O'Connor* v *Hart* (Unreported, 17 May 1982, High Court, Timaru Registry, A 29/80).

[33] *O'Connor* v *Hart* [1983] NZLR 280

[34] Note that the decision was reversed on appeal to the Privy Council on proceduralist grounds:. See the passages quoted at fns 21 and 24 of this chapter. *O'Connor* v *Hart,* then, in fact illustrates both substantivist and proceduralist approaches the defence of mental disorder.

[35] *Bell* v *Lever Brothers Ltd* [1932] AC 161, 217, per Lord Atkin (HL).

Not all mistake cases, however, respect this distinction between substance and quality. In particular, Lord Denning has attempted to introduce a category of equitable mistake, which is *content* rather than *procedurally* driven. The initial move in this direction came in the case of *Solle* v *Butcher*.[37] Solle leased an apartment from Butcher. Both believed the apartment to be exempt from rent-control legislation, and the rent was fixed accordingly. Upon discovering the apartment was not exempt, Solle sued to recover the difference between the actual and the controlled rent. Butcher counter-claimed that the lease was void for mistake. The point of the counter-claim was to destroy the contractual-tenancy from which a controlled-tenancy might spring. Denning LJ, as he then was, found that there was no mistake which would void the contract under common law: though both mistakenly thought the tenancy was exempt from the rent-control legislation, "[t]he parties agreed on the same terms on the same subject matter."[38] But, he maintained, this was not the end of mistake, for there was in addition to the common law doctrine, an equitable doctrine which allowed courts to set aside contracts for mistakes which, while not nullifying or negating consent, gave rise to unconscionable bargains. He introduced the equitable doctrine so:

---

[36] "The plaintiff's case rested fundamentally on this statement that he made: 'I contracted to buy a Constable, I have not had, and never had, a Constable'. Though that is, as a matter of language, perfectly intelligible, it nevertheless needs a little expansion if it is to be quite accurate. What he contracted to buy and what he bought was a specific chattel, namely an oil painting of Salisbury Cathedral; but he bought it on faith of a representation, innocently made, that it had been painted by John Constable. It turns out, as the evidence now stands, ... that it was not so painted. Nevertheless it remains true to say that the plaintiff still has the article which he contracted to buy. The difference is no doubt considerable, but it is ... a difference in quality and in value rather then in the substance of the thing itself." *Leaf* v *International Galleries* [1950] 2 KB 86, 93-94, per Lord Evershed. The harsh application of the substance/quality distinction here is probably to be explained by the passage of an unreasonable time - five years - between the contract and the discovery that the painting was not a Constable.

[37] [1950] 1 KB 671 (CA)

> Whilst presupposing that a contract was good at law ... the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court it was said, had power to set aside the contract whenever it was of the opinion that it was unconscientious for the other party to avail himself of the legal advantage he had obtained.[39]

Now the suggestion here is that in its equitable persona, the doctrine of mistake looks primarily not to contractual processes but to contractual content. Hugh Collins puts the point explicitly when he says this of a case which applied *Solle* v *Butcher*:

> Despite the doctrinal justification phrased in the rhetoric of mistake, the crucial factor which determined whether or not this mistake was sufficiently fundamental to warrant recission of the contract was the substantial difference in price between the property with and without vacant possession.[40]

If this is correct, and if we accept the characterisation of the two ideals of justice in contract in terms of their attention either to the conditions of contracting or to fairness of the content of the contract, the equitable extension to the mistake doctrine will constitute an attempt to give a substantivist justification for mistake.[41]

---

[38] Ibid, 691

[39] Ibid

[40] Hugh Collins *The Law of Contract* (Wiedenfeld & Nicolson; London, 1986) 145. The case was *Grist* v *Baily* [1967] Ch 532.

For the moment it will do to simply note here how this somewhat cursory sampling of cases seems to bear out the realist's claim that the law is the repository of conflicting and contradictory rules and principles. If a judge can *choose* whether to dispose of a plea of contractual mistake by appeal to the content-dependent or to the content-independent version of the doctrine of mistake, it seems that we must concede at least that the outcome of the case is under-determined by the legal rules. If the *choice* is not determined by rules, then the outcome to the case is not determined by rules. We must look for some other explanation, and this other thing will explain the decision - the case will be explained by whatever it is that leads a judge to decide to go for one rule rather than the other.

We can follow this issue a little further to bring out a related strand in the critique of the liberal conception of contract. The most influential contemporary defence of liberal legal theory is that provided by Ronald Dworkin.[42] We can usefully understand Dworkin's theory of adjudication as a response to realism. Dworkin concedes that if law were *just* a matter of rules, the realist's rule-scepticism would go through. But, of course, Dworkin denies that the law is limited to rules: the law is also ethical principles and ideals, of which rules are (inevitably imperfect) expressions.[43] Even when faced with conflicting rules, judges are guided to a determinative outcome by appeal to the relevant legal principles and ideals. So while rules alone may not create the circumstances in which autonomy can flourish, rules coupled with ideals and principles will do so: certainty is returned to the law, since there will, again, always be a unique right answer. Dworkin's theory then might seem to answer the realist's challenge.[44]

---

[41] The doctrine of equitable mistake has been the subject of a good deal of academic criticism; see especially CJ Slade 'The Myth of Mistake in the English Law (1954) 70 *Law Quarterly Review* 385; LB McTurnan 'An Approach to Common Mistake in English Law' (1963) 41 Canadian bar Review 1. Nevertheless the approach has been followed in a number of subsequent cases (though it should be noted that Denning LJ was on the bench of a number of the English cases to do so!). For a Commonwealth assortment see *Magee* v *Pennine Insurance Co Ltd* [1969] 2 QB 507 (an especially striking example since the facts are on all fours with *Bell* v *Lever* supra fn 26, the leading authority for the alternative view); *Waring* v *S J Brentnall Ltd* [1975] 2 NZLR 401; *Macrae* v *Commonwealth Disposals Commission* (1951) 84 CLR 377; *Ivanchoko* v *Sych* (1967) 58 WWR 633. The approach also seems to have a good deal of support in the United States. See, for instance, GE Palmer *Mistake and Unjust Enrichment* (Ohio State University Press, Columbus, 1962). For a radical treatment see Roberto Unger *The Critical Legal Studies Movement* (Harvard University Press; Cambridge, Mass., 1983) 75-80

[42] Dworkin's work includes *Taking Rights Seriously* (Harvard University Press, Cambridge, Mass., 1977); *A Matter of Principle* (Harvard University Press, Cambridge, Mass., 1985); and *Law's Empire* (Harvard University Press, Cambridge, Mass., 1986).

I suggested, however, that the conflict at the level of rules from which the realist's analysis proceeded, was to be explained by conflict at a deeper level. The presence of competing doctrinal treatments of mistake, for instance, is to be explained by the influence on the law of contract of competing accounts of the nature and source of contractual obligation. The doctrines and rules which make up the liberal conception of contract are to be explained by an ideological commitment to the priority of liberty, just as the doctrines and rules advocated by the critique of the liberal conception are to be explained by a similar commitment to the denial of such priority. We could put this in Dworkinian terms by saying that the conflict at the level of rules is to be explained by conflict at the level of principle. But now it might seem that the realist's problem simply resurfaces at the level of principle. Just as the realists argued that the necessity of choice between competing and conflicting rules refuted the formalist's faith in the tendency of rules to secure certainty in law, so the necessity of a similar choice between principles might be thought to refute the Dworkinian's faith that this certainty can be restored by a retreat to the level of principle.

---

[43] Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, Mass., 1977) 25-26, 36, 44-45, 67-68, 71-80, 82-90, 96-97, 105ff.

[44] Charles Fried's *Contract as Promise: A Theory of contractual Obligation* (Harvard University Press; Cambridge, Mass, 1981) is usefully regarded as a detailed application of Dworkin's general theory of law to contract. We will look at Fried's theory in detail in Chapter Eight Below.

Some such assertion lies behind the critique of the liberal conception of law and contract mounted by the Critical Legal Studies movement.[45] Indeed, just as we understood Dworkin's theory of adjudication as a response to realism, we can usefully see the CLS movement as a response to Dworkin.[46] Members of this movement grant principles and ideals a place within law, so that Duncan Kennedy analyses the manifestations in contract doctrine of the conflicting ideals of 'altruism' and 'individualism',[47] and Roberto Unger examines contract law in light of the normative principles he takes it to express.[48] But CLS theorists do not suppose that recognising the role of such ideals in law serves to render law determinate. On the contrary. Perhaps the single theme which unites the diverse practitioners of CLS is the idea that law is shot through with *contradictory* principles and ideals, and that there is no meta-principle available which will allow judges to settle the conflict between such ideals. Roberto Unger puts the CLS point in respect of contract so:

> The generalisation of contract theory revealed, alongside the dominant principles of freedom of contract to choose the partner and terms, the counter principles; that freedom to contract would not be allowed to undermine the communal aspects of social life and grossly unfair bargains would not be enforced. Though the counter-principles might

---

[45] Some care needs to be exercised in referring to 'the CLS movement'. Like the realist movement before it, is (or was) actually a group of legal theorists who appear to accept some version of the view that 1) law is indeterminate 2) that no appeal to context or social, political, or sociological inquiry can solve this indeterminacy, so that 3) judicial decisions are ultimately political. Within their agreement to some such set of propositions, however, tremendous differences of detail obtain between those commonly referred to as CLS theorists, or 'crits'.

[46] See for instance Andrew Altman 'Legal Realism, Critical Legal Studies, and Dworkin' (1986) 15 *Philosophy and Public Affairs* 205

[47] 'Form and Substance in Private Law Adjudication' [1976] *Harvard Law Review* 1685-1778

[48] Roberto Unger *The Critical Legal Studies Movement* (Harvard University Press; Cambridge, Mass., 1983)

> be pressed into a corner, they could neither be driven out completely nor subject to a system of meta-principles that would settle, once and for all, their relation to the dominant principles.[49]

CLS takes its identification of competing principles within law further. From the identification of such conflict, the movement goes on to deny the claim it imputes to liberalism that the current political, moral, social, and legal order can be *uniquely* justified from first principles. The idea here is that liberalism is supposed to claim that from the initial, and uncontroversial (since merely empirical), observation that humans are creatures of a certain type - namely free, choosing, rational planners - we can deduce, first, sets of principles on the basis of which creatures of that type would inevitably choose to have their communities ordered, and second, detailed legal, moral, and political doctrines such as the doctrines of the liberal conception of contract. The presence of competing principles within the law, however, shows, according to CLS, that at least there the claim that the dominant legal order is uniquely justified by principle is false. The derivation of the dominant order is not necessitated by first principle, but instead *chosen* by those whose interests are served by that order.[50] CLS seeks to discredit the very idea of objective principles - faith in their existence, according to the critique, is nothing more than a superstition which serves to keep the powerless in their place. The criticism portrays legal reasoning as a technique of after-the-fact rationalisation which obscures the fact that political choices are being made.[51]

---

[49] Ibid, 7. Duncan Kennedy makes the same point when he writes that "[g]iven that individualism and altruism are sets of stereotyped pro and con arguments, it is hard to see how either of them can ever be 'responsible' for a decision.... [F]or each pro argument there is a con twin. Like Llewellyn's famous set of contradictory 'canons on statutes', the opposing positions seem to cancel one and other out. Yet somehow this is not *always* the case in practice. Although each argument has an absolutist, imperialst ring to it, we find that we are able to distinguish particular fact situations in which one side is more plausible than the other. The difficulty, the mystery, is that there are no available meta-principles to explain just what it is about these particular situations that make them ripe for resolution." 'Form and Substance in Private Law Adjudication' [1976] *Harvard Law Review* 1685-1778, 1724.

[50] "Legal thought can generate equally plausible ... justifications for almost any result." Duncan Kennedy 'Legal Education as Training for Hierarchy' in *The Politics of Law: A Progressive Critique* ed D. Kairys (1982) 48

So liberalism's claim that its order is necessarily and uniquely derivable from, and so justified by, uncontroversial first premises, is not taken by CLS to be an innocuous error. Instead it is portrayed as a systematic and dangerous illusion. By presenting itself in this light, liberalism provides at once a powerful rebuttal and a disincentive to those whose interests would be served by its disintegration: opponents of liberalism are portrayed as opponents of the natural and necessary way of things. CLS seeks to expose the inadequacy of the liberal account. Once its incoherence is seen, and the merely contingent nature of its doctrines and principles appreciated, the claim goes, we can see that its claims to a unique legitimacy need not be taken seriously, still less as principled obstacles to the pursuit of opposing political, legal, and social agendas.

This last step, which links CLS's critique of the liberal order with an argument legitimating the pursuit of hitherto disenfranchised political and social claims, brings us back to a criticism of the liberal conception of contract the form of which we have already seen. In association with this extra argument, CLS becomes closely associated with a cluster of arguments which promote particular substantive goals - CLS becomes closely associated, that is, with what we have called externalist, content-dependent accounts of contract.

---

[51] "... the existence of hierarchy and contradiction in liberal society is masked by the ideal of the rule of law. Under this ideal, outcomes are said to be the product of impersonal, neutral methods, rather than as the imposed preferences of an illegitimate hierarchy. Moreover, the rule of law is presented as the only buttress against a descent into an anarchial world in which all moral claims would be equally subjective and therefore equally devoid of authority. By obscuring the value choices inherent in the application of rules, the liberal model of adjudication makes it possible to believe that existing social hierachies are not just the result of interrupted fighting. In the process, a world of deals begins to be transformed into a world of rights" Allan C Hutchinson and Patrick J Monahan 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 *Stanford Law Review* 199-245, 209-210. The characterisation is provided in aid of a critique of the position.

Hugh Collins provides an example of this association when he defends a contract theory which has its roots in the sort of critique we have attributed to CLS, but which goes on to argue that a proper understanding of contract requires an appreciation that that institution is concerned to promote a particular set of values. Collins is sympathetic with much of the CLS critique - an adequate account of contemporary contract, he argues, must acknowledge the inadequacy of the conception of contract as a system of determinative rules. Contemporary contract grants the presence of conflicting principles and doctrines, and recognises that this feature of contract allows judges to examine the content of contracts, rather than merely their technical form, in order to promote substantive views as to just or fair distributions of goods. Collins goes beyond this negative thesis when he goes on to argue that contemporary contract can only be understood as concerned, at least in part, to promote a particular, anti-liberal, set of values. Judges, on Collins' account, employ their discretion to promote particular 'communitarian' values and goals. Modern contract, he argues, no longer looks to the moral values which underlay liberal individualism - it gives priority not to free choice, but instead to the values of paternalism, trust, and cooperation[52], values Collins takes to be indicative of the granting of moral and political priority to communities rather than to individuals. The liberal conception of contract, according to Collins, is inadequate insofar as it is unable to explain the central role of these values in contract, and insofar as it is unable to protect and promote these values.

---

[52] ... the modern law of contract contains a double transformation both in form and content. The classical ideals of equality, liberty, and reciprocity have been reconstituted and modified by reference to the communitarian values of paternalism, fairness and co-operation. At the same time, the form of law itself has shifted from technical rules to open ended standards and conflicting principles, which invite courts to examine the texture of market relations with an eye to the distributive consequences of their decisions. Hugh Collins *The Law of Contract* (Wiedenfeld & Nicolson; London, 1986) 21

In running these substantivist accounts of contract - accounts of contract, that is, which argue that contract is concerned to promote particular sets of values, so that the existence and extent of contractual obligation will depend upon the compliance of particular contracts with the relevant value set - the advocates of these arguments set themselves off, in varying degrees, against liberalism's assertion of the illegitimacy of direct appeal to or favour of particular conceptions of the good through the 'neutral' institutions of the state. Hugh Collins' account was presented as an example of such an argument which flowed from the CLS critique of the liberal conception of contract. In this sort of association of the critical and the substantivist critiques of liberalism, the objection to liberalism is generated at least in part by the denial that liberalism itself respects the injunction against direct appeal to conceptions of the good - liberalism's claim to neutrality is denied in light of the arguments sketched above, to the effect that the liberal order is chosen by those whose interests are furthered by its dominance. As we have seen, however, substantivist arguments are not generated only by the CLS critique.[53] Anthony Kronman, for instance has argued that the liberal conception's reliance upon the notion of voluntariness inevitably requires reference to external standards of justice and fairness in the distribution of wealth.[54] A proper understanding of the notion of voluntariness, on Kronman's account, commits us to the view that contract law is necessarily distributive - necessarily concerned that is, with the attainment of "a *fair* division of wealth among the members of society."[55] Kronman, then, begins from within the general scope of the liberal conception, but argues that a proper explication of that conception itself shows the inevitability of an externalist account of contract.

---

[53] Indeed, it is perhaps worth noting here that for CLS itself there seems to be some tension in the marriage of these negative and positive theses - just so far as we take seriously the assertion that value claims are no more than expressions of power, dominance, and partiality, so we seem to have less reason to take seriously claims as to the value of particular substantive goals. Advocates of the claim that justice and morality are simply illusions and expressions of power relations, cannot claim that the substantive values they support are 'objectively' right while those they denounce are 'objectively' wrong, on pain of contradiction. Leff drew attention to this tension in striking fashion in 'Unspeakable Ethics, Unnatural Law' [1979] *Duke Law Review* 1229, 1249, where he wrote:

> As things now stand, everything is up for grabs.
> Nevertheless:
> Napalming babies is bad.
> Starving the poor is wicked.
> Buying and selling one and other is depraved.
> Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot - and General Custer too - have earned salvation.
> Those who acquiesced deserve to be damned.
> There is in the world such a thing as evil.
> [All together now:] Sez who?
> God help us.

Collins describes the values an appreciation of the centrality of which he sees as essential to a proper understanding of contract as 'communitarian' - they are the values which one gives priority to if one thinks that communities rather than individuals are the primary moral and political entity. We have seen how liberalism, and so the liberal conception of contract, reverses this priority: at the heart of the ideology of liberalism is the idea that individuals are the primary moral and political entity. The liberal conception of contract is concerned to protect and foster the choices of individuals. This feature of liberalism has seemed to some critics to lead the ideology to a somewhat peculiar conception of the individual or the self. Lawrence Friedman gives some indication of the nature of this self when he characterises the liberal conception in these terms:

> ... the 'pure' law of contract is an area of what we can call abstract relationships. 'Pure' contract doctrine is blind to details of subject matter and person. It does not ask who buys

---

[54] Anthony Kronman 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472. We will examine Kronman's argument in detail in Chapter Four below. We will see there that Kronman is anxious to distinguish between *liberal* and *libertarian* conceptions of contract. For current purposes the difference between the two need not concern us, to the extent that both accounts rely upon the notion of voluntariness.

[55] Anthony Kronman 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472, 472

> and who sells, and what is bought and sold. In the law of contract it does not matter whether the subject of a contract is a goat, a horse, a carload of lumber, a stock certificate, or a shoe.... In the law of contract it does not matter if either party is a woman, a man, an Armenian-American, a corporation, the government, or a church.... Contract law is abstraction - what is left in the law relating to agreements when all particularities of person and subject-matter are removed.[56]

The idea here is that, for the liberal conception what matters is the act of choice itself. Obligation flows from such acts and not from the status of the choosing individual.[57] Liberalism's apparent commitment to this notion of the contracting person, as standing independently of its particular properties, has given rise to a powerful critique of the liberal position. This critique begins from the claim that liberalism requires a conception of the self which is distinct and separate from its empirical position in the world - from its race, its gender, its socio-economic position, its community and its social role. In the philosophical tradition the idea here has been that only if the choosing self is, at least at the moment of choosing, radically distinct from, for instance, the social roles it happens to inhabit, will it be able to achieve the desired neutrality as between alternative conceptions of the good. Kant achieves this detachment by reliance upon the 'transcendental subject': the moral law, on Kant's account, is to be founded upon the exercise of 'pure reason' - reason exercised independently of all contingent purposes and ends, independent even of the contingencies of "the special circumstances of human nature".[58] Rawls achieves a similar effect by the strategy of the original position - the principles of justice upon which a community is to be ordered are to be chosen by community members who are ignorant of, inter alia, their place in the community, their race and gender, their wealth, intelligence, strength or other natural benefits. The purpose of these epistemological deprivations is to prevent the choice of principles being prejudiced by the contingency of natural and social circumstances. [59]

---

[56] Lawrence M. Friedman *Contract Law in America* (University of Wisconsin Press; Madison and Milwaukee, 1965) 20

[57] Hence Maine's famous dictum: "... we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract.*" Henry Maine *Ancient Law* (1864) 165

[58] Immanual Kant *Groundwork of the Metaphysic of Morals*, trans H.J. Paton, 1956, New York, 92

Liberalism, then, this critique alleges, is committed to a conception of the self as radically separate from the contingent things which happen, in the real world, to be true of it. Liberalism is said to require a conception of the self that stands independently of its status as a particular 'situated' individual - an individual of a particular gender, class, socio-economic position, and social role, committed to certain projects, relationships and values. All of these contingencies are to put aside in pursuit of a neutrality between conceptions of the good. Communitarians offer a number of arguments in support of the claim that we should reject this conception of the self. Two examples will give a sufficient indication of their character for the moment. If we reflect upon ourselves, one argument claims, we don't *perceive* ourselves as radically unencumbered - Rawls' conception of the self as 'given prior to its ends' is 'radically at odds with our more familiar notion of ourselves as being "thick with particular traits."'[60] Further, even if the liberal conception of the self could be sustained, it would not be able to perform the task of choosing between conceptions of the good set it by liberalism: such a choice requires access to *criteria* by which to choose and rank alternatives, and these criteria are available only to a self embedded in community and granted full access to its empirical properties. The liberal self would be incapable of meaningful and effective deliberation and choice. The liberal self, Alasdair MacIntyre writes " is ... thought of as criterionless, because the kind of *telos* in terms of which it once judged and acted is no longer thought to be credible."[61] The freedom from contingency and prejudice to which the liberal self aspires, writes Charles Taylor, "would be a void in which *nothing* would be worth doing ...."[62] Deliberation, for such a self, Sandel maintains "can only be an exercise in arbitrariness."[63] Liberalism, then, is said to require a concept of the self which is radically at odds with our experience of ourselves, and which, in any case, could not perform the tasks set it by liberalism even if it could be sustained.

---

[59] John Rawls *A Theory of Justice* (Oxford; Oxford University Press, 1971) Chapter 3. The choosers know only those things about themselves which are true of all of their fellow community members, regardless of the contingent facts which happen to be true of them - all persons, regardless of social position, race, values, plans, etcetera, are assumed to have certain preferences, on the grounds that the satisfaction of those preferences is likely to promote all ends, whatever those ends happen to be.

[60] Michael Sandel *Liberalism and the Limits of Justice* (Cambridge; Cambridge University Press, 1982) 100, quoting Robert Nozick *Anarchy, State, and Utopia* (Oxford; Basil Blackwell, 1974) 228

These attacks on liberalism's concept of the self are epistemological and metaphysical. There is a another, much older, attack on that concept of a more political or empirical nature which we will usefully note as well. This criticism begins from the observation that the reality over which law presides is marked by an almost complete absence of individuals possessing those features from which the liberal conception proceeds. Liberalism proceeds from the idea that the world is populated by individuals who possess and exercise the capacity for choice, who plan, who conduct their lives according to rational and autonomous plans. But as soon as we depart the liberal's 'Eden of the innate rights of man'[64] we find ourselves in a political and social landscape characterized by domination and inequality. Few people have sufficient control over their lives to approach the individualist's ideal of the free, choosing, rational planner. The reality for most is one of domination, subjugation, and subordination. Their tasks and projects are set by others. Even their tastes and preferences are manipulated and controlled. Liberalism's 'autonomous individual' is an empty ideal. For most, heteronomy prevails. The political and social reality, then, is that liberalism proceeds from an ideal of the autonomous individual - a free, choosing, rational planner -which is never or rarely realised. Liberalism should be rejected since it proceeds from a mistaken assumption as to the political and social reality in which individuals live, and so a mistaken assumption about the freedom they are able to possess and exercise.

---

[61] Alasdair MacIntyre *After Virtue* (London; Duckworth, 1981) 31-32.

[62] Charles Taylor *Hegel and Modern Society* (Cambridge; Cambridge University Press, 1979).

[63] Michael Sandel *Liberalism and the Limits of Justice* (Cambridge; Cambridge University Press, 1982)

[64] Karl Marx *Capital* (Moscow; Progress Publishers, 1954) 172

This will suffice for our overview of the liberal conception of contract and its critics. This opening chapter sought to give both a sampling of specific moves within the debate between the conception and the critique, and an indication of the position of that debate within the wider endeavours of political, legal, and moral philosophy. In doing so it also attempted to provide an account of the 'ideals of contract' from which the protagonists in the debate proceed. The liberal conception was portrayed as proceeding from a commitment to the moral and political priority of individuals. The institution of contract is designed, on this account, to protect the free choices of individuals. On such an account the determination of the existence and extent of contractual obligation requires regard only to the phenomena of choice. It does not require or allow regard to the content of contracts - whether or not an individual has voluntarily entered into a contract will not be determined by examination of that to which they are alleged to have agreed.[65] The liberal conception, then, gives rise to an internalist content-independent account of contract. The various strands of the critique of the conception are concerned to deny that contractual obligation rests merely upon free or voluntary choice. Contractual obligation, according to the critique will only arise where the content of contracts - that to which the parties have agreed - is consistent with some external standard of such obligation. On this account, no matter that parties have quite genuinely consented to the terms of a contract which (sufficiently) seriously disadvantages one of them, or which otherwise violates some principle of fairness or justice in exchange, no contractual obligation will arise. Here contractual obligation is portrayed as externalist and content-dependent.

---

[65] Though of course the content of some contracts *may* be such as to raise doubts that an individual *has* voluntarily taken on the burdens of that contract: "Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence

At the level of specific moves within the debate between the conception and the critique, we identified a number of strands which alleged the descriptive inadequacy of the liberal conception. The congruence of the liberal conception with the actual law of contract was called into question, with particular reference to the remedies available to successful plaintiffs in actions for breach of contract - the actual law of contract regards expectation damages rather than specific performance as the primary remedy for breach, and even that remedy is subject to several limitations, including a general duty to mitigate loss. Both of these features seem to sit ill with the liberal conception's commitment to the centrality of choice and consent to contractual obligation. This incongruence has been further exacerbated by the courts' increasing recourse to a reliance account of contract which leads on the one hand to a willingness to impose contractual obligation for what

---

or some other form of victimisation." *Hart* v *O'Conner* [1985] AC 1000, 1018; [1985] 1 NZLR 159, 166 (PC) per Lord Brightman . Contrast Lord Bramwell in *Manchester Sheffield and Linconshire Railway Co* v *Brown* (1883) 8 App Cas 703, 718-719 (HL.E): "...I am for my own part prepared to hold, not that an agreement between two people which has been voluntarily entered into by them cannot be unreasonable, but that the fact that it has been voluntarily entered into by then is the strongest possible proof that it is a reasonable agreement ...."

according to the liberal conception should be noncontractual undertakings, and on the other to an unwillingness to award damages beyond that figure necessary to compensate for reliance-loss, regardless of the extent of the defaulting party's undertaking. The doctrine of consideration is commonly taken to provide a further example of the liberal conception's descriptive inadequacy - in refusing to enforce promises which are not supported by consideration the law intimates that it is some characteristic of the passage of consideration which gives rise to contractual obligation, rather than promises or their contractual equivalents. From here we traced the critique through the 'tort theorists' and into the more theoretical criticisms of the legal realists. The realist's suggestion that law was inevitably the receptacle of contradictory rules among which judges might choose as they wished, seemed to be borne out in a cursory examination of the contractual defences. The apparent derivation of these conflicting rules from conflict at the level of principle suggested that a Dworkinian retreat to the level of principle was an inadequate response to the realist's challenge upon the determinativeness of law, and led into the radical critique of critical legal studies. From here the survey delved into the substantive contract theory, exemplified by Hugh Collins, and the broader communitarian critique of the liberal conception of the self as an entity at once prior to its ends yet able to rank and choose between them. Finally, the account noted an earlier and empirical critique of the liberal conception of the individual as a free, choosing, rational planner, associated with the idea that the social and political reality in which individuals actually function is such as to prevent the meaningful exercise of choice and the supposed capacity to order a life according to autonomously generated plans and projects.

The last few pages of this discussion have taken us to topics at the heart of political and moral philosophy. Given our starting point that is as it should be. We began with the idea that there was reason to expect the institution of contract to be the flag-ship of the the ideology of liberal individualism. To the extent that the intuition that the debate within contract law *is* closely related to - or, to put the matter in stronger terms, is simply a manifestation of - these broader concerns within political philosophy, it should be expected that the critique of the liberal conception of contract will overlap with, or lead into, more general criticisms of the ideology of liberal individualism itself. To the extent that the liberal conception of contract is the manifestation of liberal ideology, one should expect the critique of the institution to be derivative from, and so closely related to, the critique of the ideology. The connection here should be taken to be some indication of the broader significance of the issues raised in this thesis. If the critique outlined here is successful in respect of the institution of contract law, one might expect that critique to have good prospects of success against the general ideology as well. As I remarked at the outset, if the liberal's perception of the promise of contract is to be borne out anywhere, it had better be borne out in an institution which concerns itself precisely with contractual obligation.

PAGINATION ERROR.

TEXT COMPLETE.

ERREUR DE PAGINATION.

LE TEXTE EST COMPLET.

NATIONAL LIBRARY OF CANADA.

CANADIAN THESES SERVICE.

BIBLIOTHEQUE NATIONALE DU CANADA.

SERVICE DES THESES CANADIENNES.

Chapter Two

Contract Theories - Types and Tokens

In the previous chapter I attempted to give an overview of the liberal conception of contract and its critics. The presentation of that overview may be thought to have operated at two levels. At one extreme, it provided a certain amount of detail of the institution of contract law itself. It was concerned to give some account of selected features of contract doctrine. It was also concerned, at the other extreme, to give an account of what were described as *ideals* of justice in exchange. These ideals constituted competing views as to the nature and source of contractual obligation, one internalist and content-independent and the other externalist and content-dependent. A third level obtains between these two extremes, occupied by *theories* of contract. This analysis of the operation of the overview requires a distinction between *ideals* and *theories*. For our purposes the following will serve as an adequate defence of this distinction. Although we have been especially interested in the relation between the ideals identified and contract doctrine, the ideals are not particularly ideals *of contract* at all. Rather, they state positions which are as relevant to, for instance, ethics, politics, economics, legal philosophy generally construed, not to mention torts and constitutional law, as they are to contract. The ideals, then, fail to serve as theories of contract, in the first place, because of their *scope*. This feature of the ideals is evidenced in the fact that they are realised in theories in all of these domains. The economic theory of Adam Smith and the political theory of Robert Nozick are as legitimate instantiations of the internalist content-independent ideal of justice in exchange as is the classical theory of contract.[1] The ideals also fail to serve as theories of contract because of their *remove* from doctrine. Even to the extent that they are relevant to doctrine - and I hope to have given some indication of that extent in the course of the overview - the ideals do not attempt to explain or justify specific features of the institutions and practices of the doctrines to which they happen to be turned. The ideals bear upon contract doctrine in only the most general fashion. The distinction between ideals and theories, then, rests upon the *scope* of the ideals - they explain or justify not just contract doctrine and practice, but also the doctrine and practice of, for instance, ethics, politics, and other legal fields - and the *remove* of the ideals from doctrine - they do not tell us in any detail what contract should look like, do not explain, justify, or predict specific aspects of contract doctrine.[2]

Ideals and theories are related. Theories are motivated by ideals. The consent theory of contract, for instance, is a realisation at the level of theory of the internalist content-independent ideal of justice in exchange. Given the generality of ideals, various realisations are possible at the level of theory. To the extent to which these realisations are consistent with the broad constraints stated by the ideals, they may be counted as realisations of the ideal, though they will differ in varying degrees both from the ideal and from one another. So, for instance, while the consent theory of contract is a realisation of the internalist content-independent ideal, so is the will theory, though the two theories differ in significant respects from one and other.[3] We can usefully think of the ideals as stating conditions according to which theories will count as instances or tokens of theory types: ideals then will be *types* and theories will be *tokens*.

---

[1] Adam Smith *The Wealth of Nations* (1776); Robert Nozick *Anarchy, State, and Utopia* (Oxford; Basil Blackwell, 1974)

[2] For an account of the relation between contract theory and these three functions - that of explanation, justification, and prediction - see Michael Bayles 'The Purpose of Contract Law' (1983) 17 *Valparaiso University Law Review* 613

We have identified two types: one internalist and content-independent and the other externalist and content-dependent. Internalist content-independent ideals claim that the existence and extent of contractual obligation can and should be identified without examination of the content of contracts, and without recourse to external, or independently postulated, standards of fairness or justice in exchange. The existence and extent of contractual obligation will not depend upon what the parties have contracted to do, and, *a fortiori*, will not depend upon the consistency of such contractual contents with external standards. Contractual obligation, on this account, does not arise independently of actual and specific contracts. Such obligation is uniquely and peculiarly contractual. The externalist content-dependent ideal of justice in exchange gives a quite different account of contract. Here contractual obligation depends not upon contracts *per se*, but precisely upon independently postulated standards. The application of these standards requires examination of the content of particular contracts in order to assess their consistency with such independent, or external, standards of fairness or justice in exchange. With these types in hand, we can usefully present a number of contract theories, identifying them as tokens of the appropriate type. For the moment, our concern will be solely with presentation and classification. We will examine some of these theories in further detail shortly.

---

[3] We will present examine the will and consent theories of contract below and in Chapters Six and Seven respectively.

1) The Will Theory of Contract

The will theory of contract law founds contractual obligation on a certain kind of respect for the wills of contracting parties. The theory is premised upon the idea that acts of human will are to be valued in a manner and to an extent such that their mere occurrence provides courts with reasons to act in certain ways. As a specifically contractual theory, will theory requires a 'union of wills'. Holland writes that:

> ... acts which are directed to the production of a legal result ... may be either one-sided, where the will of only one party is involved, or two-sided, when there is a concurrence of two or more wills in producing a modification of the rights of the parties concerned. Such a two-sided act, having for its function the creation of a right is a 'Contract' ....[4]

According to will theory, then, the mere occurrence of the appropriate 'two-sided act of will' provides courts with reasons to act in certain ways - namely to act in those ways which will give effect to the modification of the rights of the parties willed by them.

Why would acts of will be valued this way? Anglo-American contract evidences two sorts of answers:

First, there is a tradition which portrays human will and its actions as *inherently* valuable. Contract so conceived, wrote Morris Cohen , "... gives expression to and protects the will of the parties, for the will is something inherently worthy of respect".[5] This type of answer has two principal sources.

---

[4] TE Holland *Jurisprudence* (London; Clarendon Press, 1846) 225

[5] Morris R Cohen 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553, 575

One derives from Immanual Kant. As we have seen Kant grounds his moral theory on a conception of the self as radically distinct from its contingent, empirical properties and ends. To act from the maxims postulated by this self is to exercise the "... good will [which] is not good because of what it performs or effects, not by its aptness for the attainment of some proposed end, but simply by virtue of the volition, that is, it is good in itself...."[6] We have already noted the indirect influence of the Kantian answer on contract - Kant is one of the principal precursors of the ideology of liberal individualism from which the liberal conception derives. Kant had a more direct influence as well: Savigny's 1851 *Das Obligationenrecht*[7] drew explicitly on Kant in promoting a version of 'pure' or 'inherent' will theory, and was in turn relied upon to similar effect by Pollock in the first edition of his enormously influential *Principles of Contract*.[8] The natural law tradition is the second source for the inherent account of the value of will and its actions.[9] So Grotius maintained that "ownership of property could be transferred by an act of will', and explained this fact by saying that "nothing is so in accord with the law of nature as that the wish of the owner should be held valid when he desires to transfer his property to another".[10] Grotius illustrates the general approach of the Natural Lawyers of his age.[11] He supposes that he can deduce directly from certain premises about the nature of humans (and their relation with God), the conclusion that acts of will were to be valued and protected by human institutions. Human will is here taken to be inherently valuable - it is valuable simply in virtue of the fact that it is human will.

---

[6] Immanual Kant *Groundwork to the Metaphysic of Morals* trans. H.J. Paton, (New York; 1956) 1

[7] A contract is "a union of several in an accordant expression of will with the object of creating a an obligation between them." Friedrich C. von Savigny *Das Obligationenrecht* (1851) Book 2, Chapter 8

[8] Sir Frederick Pollock *Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* (London; Stevens, 1876). From the third edition (1881) on, Savigny was relegated to an appendix , and the text emphasised the element of reliance (see infra for a discussion of reliance theory) rather than "the artificial equation of wills intentions". We examine this general motivations for this change of emphasis in Chapter Six below.

[9] See e.g. PS Atiyah *Promises, Morals, and Law* (Oxford; Oxford University Press, 1981) 14

[10] Hugo Grotius *De Jure Belli ac Pacis* (1646) trans. F.W. Kelsey (Oxford; Clarendon press, 1925) Book II, Chapter XI, paras 3 & 4

The second answer to the question as to why acts of will should be valued as the will theory proposes gives an *instrumental* account. This answer rests upon the belief that whatever *is* valued fundamentally, will be promoted most effectively by respecting acts of will. According to these instrumental approach, acts of will attain their value derivatively, as instruments for the achievement or promotion of that which is valued non-derivatively. John Stuart Mill exemplifies the approach. Mill took happiness to be fundamentally or nonderivatively valuable. At the political or social level, he supposed, the way to promote happiness was to respect individual liberty - to give a high value to the acts of will of members of the community. Such a policy, he supposed, fostered the development of the mental and moral faculties necessary to proper self-realisation, which in the end he identified with happiness, and avoided the inevitable errors attendant upon determinations of what was best (i.e. most conducive toward happiness) for others. Hence in *On Liberty*,[12] Mill argued that the best social system was one in which individuals were left free to do as they wished, to exercise their own powers of choice and action within certain well known limits.[13] The point

---

[11] See in particular Samuel Pufendorf *De Jure Naturalae et Gentium* (1672) trans. C.H. & W.A. Oldfather (Oxford; Clarendon Press, 1934) Book III, Chap V, paras 9-11

[12] John Stuart Mill *On Liberty* (London; Parker, 1859)

[13] Any reading of Mill which renders the relation between 'On Liberty' and Mill's utilitarian writings straightforward is likely to be controversial. Note as well that an appeal to Mill on this point needs to be treated with some care in the context of a discussion of contract. In his *Principles of Political Economy* (London; Longman, 1848) Book V Chapter I, Sec. 2, Mill wrote that 'every question which can possibly arise as to the policy of contracts, and of the relations they establish among human beings is a question for the legislator; and one which he cannot escape from considering, and in some way or other deciding." Mill

for now is that acts of will are valued here not because of any intrinsic feature they possess, but because they promote something else which *was* seen to be intrinsically valuable.[14]

There seems to be an affinity between will theory and the liberal conception of contract. Under the liberal conception, the law of contract functions to facilitate the creation of legal obligation upon terms chosen by individuals perceived of as free, choosing, rational planners. The will theory of contract gives an account of contract based upon a commitment to the idea that the existence and extent of contractual obligation is to be determined by reference to the choosing capacity of persons - namely their wills. To the extent that contractual obligation is to be determined in this fashion, no regard need be had to the content of contracts or to considerations external to the relationship between the parties. *Prima facie*, then, will theory then will be internalist and content-independent.

A caveat needs to be added to this conclusion as to the theory type of which will theory is a token. An instrumental account of the value of will, at least, might seem to give rise to an externalist theory of contract. On an instrumental account what is *really* valuable is that which is valued nonderivatively. To the extent that the value of that thing, whatever it happens to be, is to be explained independently of specific contractual relationships, the contractual theory which gives a high value to will because

---

seems to have supposed that contracts typically failed the 'self-regarding actions test' which determined the scope of his liberalism.

[14] The instrumental view is most nearly represented in contemporary contract theory by the economic theory of contract law to which we will turn in its own right below. For the moment it will do to say that that theory is premised upon the idea that the general welfare will be promoted most effectively if courts respect the acts of will of contracting parties. The fundamental principle from which the analysis proceeds is that if voluntary exchange is permitted - if the courts respect acts of will - resources will gravitate toward their most valuable uses. And here the respect accorded to acts of will is not accorded because of any intrinsically valued feature of will itself, but because of the perception that respect for will promotes that which the economic liberals do value.

of the value of that thing might seem to be externalist.[15] For the moment it will do to say this: what we think of this caveat will depend upon whether we classify a theory by reference to the *criteria* of obligation it proposes, or by reference to its *explanation for the selection of that criteria.* As a matter of explanation, the instrumental version of will theory is clearly in some sense externalist. Its explanation obtains independently of or external to particular contractual relationships. To the extent that this version of will theory takes acts of will to be criteria of obligation, however, it may seem proper to regard it as internalist, since, the story might go, it is those criteria which determine the existence and extent of contractual obligation, and they are not independent of particular contractual relationships - they are internalist and content-independent. This issue will arise again.

2) The Consent Theory of Contract.

The consent theory of contract is closely related to the will theory. We will see the distinction between the two more clearly when we come to set out the two theories in more detail shortly. For the moment it will do to say this: according to the will theory of contract, contractual obligation rests upon the mere occurrence of acts of will of the appropriate type. Will theory has traditionally had difficulty accounting for what is standardly referred to as the 'objectivity of contract'. The idea is that contract law determines the meaning, and so the legal significance, of utterances not by reference to the will or volition or intention of speakers, but to the interpretation that would be given those utterances by a reasonable person in the shoes of their audience.[16] If a person says something which a reasonable person would take to indicate that the speaker willed *y*, it matters not that the speaker 'in fact' - by the lights, that is, of some internal mental state[17] - willed *x*, she will be taken to have willed *y* for the purposes of determining contractual obligation. But this is just to say, the complaint against will theory goes, that *will* does not determine contractual obligation after all.

---

[15] This caveat might also be raised in respect of the natural law version of the theory, to the extent that that theory looks to external moral theory.

[16] "If, whatever a man's real intention may be, he so conducts himself that a reasonable would believe that he was assenting ... the man thus conducting himself would be equally bound as if he had intended to agree ...." *Smith* v Hughes (1871) LR 6 QB 597, 607, per Blackburn J

The consent theory of contract may be taken to be a response to this and related objections to will theory. In the hands of its principal advocate, Randy Barnett,[18] it begins from a moral theory of rights which governs the acquisition and transfer of property or entitlements, where "[t]he concept of rights and entitlements is a social one whose principal function is to specify boundaries within which individuals may operate to freely pursue their respective individual ends and thereby provide the basis for cooperative interpersonal activity."[19] The law of contract attaches to this rights theory as "a body of general principles and more specific rules the function of which is to identify the rights of individuals engaged in transferring entitlements, and thereby indicate when physical or legal force may legitimately be used to preserve those rights and to rectify any unjust interference with the transfer process."[20] The social functions here - the specification of boundaries and the identification of rights - require a system of contract which is *public*: "an assent to alienate rights must be *manifested* in some manner by one party to the other to serve as a criterion of enforcement. Without a manifestation of assent that is accessible to all affected parties, that aspect of a system of entitlements which governs transfers of rights will fail to achieve its main function ... it will have failed to identify clearly and communicate to both parties (and to third parties) the rightful boundaries that must be respected."[21] The consent theory of contract takes consent to be precisely "a manifestation of an intention to alienate rights".[22] Consent is taken here, then, to meet the desiderata highlighted by the flaws of the will theory, and, on Barnett's account, to be uniquely able to do so.

---

[17] We will examine the coherence of the idea that the meaning of such utterances might turn upon private mental states in Chapter Six below.

[18] Randy E Barnett 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321

[19] Ibid 301

[20] Ibid 295

Prime facie, at any rate, the consent theory of contract is internalist and content-independent: what matters is whether consent, understood as an external manifestation of an appropriate intention, has been given and not whether that to which the parties have agreed is consistent with some external standard of justice in exchange. Like will theory, consent theory can be seen to have a close affinity with the liberal conception of contract - it begins from a moral theory which gives priority to the capacity and rights of individuals to set and pursue their own ends, insofar as common possession of such rights by others allows. The theory portrays contract law as it does, since only so portrayed, the claim goes, will contract law function to maximise the freedom of persons within communities.

3) The Promise Theory of Contract

The promise theory of contract is properly thought of as a cluster of related theories.[23] The idea behind these related theories is that contractual obligation is a species of promissory obligation. Contracts are taken to be types of promises, or to derive from promises or the institution of promise, so that the obligation to keep promises gives rise to an obligation to keep contracts.

---

[21] Ibid 302. Barnett's emphasis.

[22] Ibid 304

[23] "One proposition on which authors with widely divergent views of the theory of contract are capable of agreeing is that contracts are promises." Anne De Moor 'Are Contracts promises?' (1987) *Oxford Journal of Legal Studies* 103-124, 103

The promise theory, in one guise our another, has probably been the most popular theory of contract. So the second United States Restatement of Contracts defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty",[24] echoing definitions offered in such classic contract texts as Pollock[25] and Williston.[26] A brief sketch of some representative strands of promise theory will serve to give an indication of its nature and scope.

In some guises at least, the promise theory appears paradigmatically internalist and content-independent. Charles Fried, for instance, argues that the "promise principle ... is the moral basis of contract law",[27] and describes his theory of contract as "my version of the classical view of contract proposed by the will theory ."[28] Fried is concerned to defend an account of contract pursuant to which contract "offers a distinct and compelling ground of obligation",[29] against the critique which in his view amounts to "the subordination of a quintessentially individualist ground for obligation and social control, one that refers to the will of the parties, to a set of standards which are ineluctably collective in origin and thus readily turned to collective ends."[30] The general idea here is straightforward enough: if it is the *promise* which creates obligation then it should not matter what is promised, and in particular it should not matter whether the content of the promise satisfies the requirements of an independent standard of justice in exchange.

---

[24] *Restatement (Second) of Contracts* para 1 (1979)

[25] *Pollock's Principles of Contract* (Steven & Son; London, 1950) 1

[26] *Williston on Contract* First Ed (1920) section 1

[27] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass, 1981) 1

[28] Ibid 6

[29] Ibid

[30] Ibid 5

Other accounts of contractual obligation in terms of promise move further away from the internalist content-independent ideal. Joseph Raz's account may be regarded as a first step in that direction.[31] Raz seems content to suppose that contract might usefully be analysed in terms of promise, and further that properly understood promises give rise to content-independent reasons for action. But this feature of promises is supported by an argument to the effect that a world in which people are able to create the sorts of relationships this account of promising allows, is a good world which should be protected.[32] The power of promises to create content-independent reasons for action, then, is to be explained by appeal to considerations which are independent of, or external to, particular promisor/promisee relationships. Raz's account then is, in some sense at least, externalist. But these externalist considerations are called upon by Raz to explain only the status of promissory principles generally. Within particular relationships promises give rise to content-independent reasons for action and are not amenable to appeal to external considerations - promises create what Raz has called *exclusionary reasons.*[33]

Patrick Atiyah's account of the relation between contract and promise is yet further from the core of the internalist content-independent ideal, though arguably still within the fold of promise theory.[34] Atiyah shares with his fellow promise theorists the view that contractual and promissory obligation are of a kind. But Atiyah proceeds from this common starting point to a conception of contract which is, at the very least, externalist.[35] Atiyah argues that promises do not, in and of themselves, create moral obligations.[36] Rather, he maintains, promises are *admissions* of the existence of antecedent obligations of the promisor. Further, these obligations arise either from the harm which would accrue to the promisee, or the unjust enrichment which would accrue to the promisor, if the promise was not kept.[37] So, Atiyah concludes, if there has been no reliance by the promisee, and no conferral of benefit upon the promisor, there is no immorality in the promisor's revocation of a promise.[38] Atiyah, then, assimilates contract and promise, but the account of promising from which he proceeds is one which rejects the idea that promissory, and therefore contractual, obligation is uniquely or peculiarly promissory or contractual. On the contrary, promises and contracts are simply ways in which obligations which obtain independently of promise and contract, and which are based upon harm and reliance, are to be evidenced.

---

[31] See in particular Raz's 'Promises and Obligations' in *Law, Morality, and Society: Essays in Honour of HLA.Hart* (Oxford; Clarendon Press, 1979) 210-228, and 'Voluntary Obligations and Normative Powers II' (1972) Supp. Vol. 46 *Proceedings of the Aristotelian Society* 79-101. The latter paper is a response to Neil MacCormick's 'Voluntary Obligations and Normative Powers I' in the same volume at 59-78.

[32] See, e.g. 'Promises and Obligations' in *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Clarendon Press; Oxford, 1979) 210-228, 228 where Raz points out that his account of promissory obligation depends upon "the intrinsic desirability of forms of life in which people create or acknowledge special bonds between them and certain other individuals ...."

[33] Raz gives an explicit account of the nature of such reasons in *Practical Reasons and Norms* (Hutchinson; London, 1975). See Tim Dare 'Raz, Exclusionary Reasons, and Legal Positivism' (1989) 8 *Eidos* 11-33 for a critical exposition and assessment.

4) The Economic Theory of Contract

Like promise theory, the economic theory of contract is properly thought of as a cluster of related theories. The relevant theories are united in placing the notion of *efficiency* at the heart of their analyses of contract. The general idea here is that legislators and judges either do or should determine the existence and extent of contractual obligation by reference to the concept of economic efficiency. From this common beginning, however, the cluster of economic theories of contract admits of considerable variety. We have alluded to the first incidence of such variety already: such theories may be either *analytic*, where they will be concerned to identify and perhaps evaluate what legislators can and have been doing,[39] or *normative*, where they will be concerned to say what judges ought to be doing.[40] Further variety in the cluster of economic or efficiency theories results from the presence of competing accounts of efficiency itself.[41] A full inquiry into the economic theory of contract would need to inquire into these issues and differences in detail. We can achieve our current classificatory purpose, however, with a more general and cursory treatment.

---

[34] See especially his *Promises, Morals, and the Law* (Clarendon; Oxford, 1981). We will address the question of whether Atiyah is within the fold of promise theory in Chapter Eight below.

[35] We will see that Atiyah is to be distinguished from other promise theorists, as well as on the general grounds noted here, since he supposes that the reduction of contract to promise runs in the opposite direction from that favoured by, for instance, Fried. Whereas Fried supposes that an analysis of the nature of promise compels us to a certain view of contract, Fried claims that his analysis of promise is compelled by an understanding of contract doctrine. Atiyah, then, might be thought to be giving an account of promise as contract, rather than an account of contract as promise.

[36] *Promises, Morals, and the Law* (Clarendon; Oxford, 1981)123-129

[37] Ibid 184-202

[38] Ibid 202-215

Economic contract theories are commonly taken to be tokens of what we have called the externalist content-dependent theory type, since, the claim goes, they inevitably appeal to external standards of efficiency. In presenting a taxonomy aspects of which we will examine below, Randy Barnett writes that certain types of contract theories, "... evaluate *the substance* of a contractual transaction to see if it conforms to a standard of evaluation that the theory specifies as primary. Economic efficiency and substantive fairness are two such standards ...."[42]

---

[39] See for instance Richard Posner's 'A Theory of Negligence' (1972) 1 *Journal of Legal Studies* 29 where Posner argues that many negligence cases have been decided in ways which are consistent with a desire to promote efficient allocations. It should be noted that he does not argue that judges have in fact decided these cases with the 'efficiency model' in mind. The idea is rather that the cases display an implicit economic rationality. The law is said to 'evolve' toward efficiency without conscious effort to that end.

[40] "The normative branch of the theory asserts that [promoting efficient resource allocation] ... is what judges *should* try to do in deciding common law cases." Richard Posner 'A Reply to Some Recent Criticism of the Efficiency Theory of Common Law' (1981) 9 *Hofstra Law Review* 775, 779

[41] "The concept of economic efficiency is complex .... There are three or perhaps four notions of efficiency it comprehends - allocative efficiency, Pareto optimality, Pareto superiority, and Kaldor-Hicks efficiency.... Yet another efficiency standard has been advanced, such that an efficient distribution ... is wealth optimizing." Jules L. Coleman 'Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law' (1980) 68 *California Law Review* 221-249, 222

There is, however, reason to doubt the accuracy of this classification of efficiency theories. The problem is that efficiency theories typically *define* efficiency as the satisfaction of subjective preferences. Efficiency theory is almost always based upon the subjective theory of value.[43] That theory claims, in short that only an individual knows what some good, *x*, is worth to her. The value she places upon *x* is thought to be revealed in her choices about what she is prepared to accept in exchange for *x*. The very fact she is prepared to exchange *x* for *y*, the story goes, shows that she values *x* less than *y*. If we understand efficiency in this way it is axiomatic that voluntary exchanges are efficient.[44] If *A* owns a good that she values at $100 and *B* values at $150, both will be made better off at an exchange of *A's* good for *B's* money at any price between $100 and $150. Given an exchange at, say, $125, *A* will end up with money she values at $125 in return for a good she valued at $100, and *B* will end up with a good she values at $150 in return for cash she valued at $125. According to the subjective theory of value, the goods and cash had a total value of $225 prior to the exchange (*A's* $100 good and *B's* $125) and a total value of $275 after the exchange (*A's* $125 and *B's* $150 good). Ignoring effects on third parties, 'total value' has increased by $50. Such a value maximising exchange is taken to be efficient. Richard Posner writes that:

---

[42] Randy E Barnett 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 277. We will discuss Barnett's classification in Chapter Three below.

[43] See for instance Anthony Kronman & Richard Posner *The Economics of Contract Law* (Little, Brown and Co., Boston and Toronto, 1979) 1-2

[44] We explore some of the difficulties which flow from the voluntariness requirement in later chapters, especially in our discussion of Anthony Kronman's 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472-511 in Chapter Four below.

> By a process of voluntary exchange, resources are shifted to those uses in which the value to consumers, as measured by their willingness to pay, is highest. When resources are being used where their value is highest, we may say that they are being used efficiently.[45]

Efficiency, on this reading, is a purely *formal* concept. Determinations of efficiency can be made quite independently of any knowledge of the substance of agreements - quite independently, that is, of any knowledge of just what it is that the parties have agreed to. The mere fact that people are prepared to exchange is taken to show that the exchange is value maximising, and so efficient. But if this is correct, then, *pace* Barnett et al, we will not properly classify efficiency theories as external and content-dependent. The possibility of a purely formal definition of efficiency suggests that contract theories which rely upon that concept should be regarded as internalist and content-independent.[46]

5) The Bargain Theory of Contract

The bargain theory of contract is motivated by Anglo-American contract law's requirement that enforceable contracts be supported by *consideration*, where consideration is to be defined as something either given or promised in exchange for a promise. A promise in exchange for which nothing has been given, and no reciprocal promise has been made, will not be enforceable in contract by virtue of lack of consideration. Contract law does not enforce gratuitous promises. We have seen already that the requirement for consideration in contract has been taken to show that promise theories of contract cannot be right: if contractual obligation flows from promise itself, why should it not flow equally from a promise to make a gift as from a promise to do something in exchange for some good or reciprocal promise?[47] The bargain theory may be seen as the positive aspect of this critique - since contract requires consideration, perhaps, the idea goes, it is consideration itself which is the distinguishing feature of contract. The bargain theory of contract, then, identifies 'exchange' or 'bargain' as at least a necessary condition of contractual obligation.[48] This picture of contract may be explained in a number of ways. Which explanation we favour will determine where the bargain theory fits in respect of our ideals of justice in exchange.

---

[45] Richard Posner *The Economic Analysis of Law* (Little, Brown and Co., Boston and Toronto, 1986) 9

[46] Such formal definitions of efficiency have attracted a good deal of substantive criticism. By way of example, note that the suggested analysis relies upon a willingness to exchange or pay. But such willingness depends upon prior distributions of wealth - no matter what *B* values *A*'s good at, she will not be able to buy it if she has no money.

One account portrays bargain theory as a species of the economic theory of contract. The idea here is that the point of contract is to promote value maximising, or efficient, transfers of property. Undertakings which are part of such exchanges are potentially contracts. Undertakings which are not part of such exchanges are not potentially contracts; they will not give rise to contractual obligation: "While an exchange of goods is a transaction which conduces to the production of wealth and the division of labour, a gift is, in Bufnoir's words a 'sterile transaction'".[49] Richard Posner provides a different economic rationale for the bargain requirement, arguing that gratuitous promises *do* create extra utility for the promisor, over and above the utility of the promised performance itself, so that enforcement of them is not in and of itself economically unsound. The reason the law does not enforce gratuitous promises, in Posner's view, is that they typically involve 'small stakes', so that the utility of performance is likely to be swamped by the cost of enforcement.[50] We need not address the adequacy of these economic rationales at the moment. It will do to say that to the extent that bargain theory is portrayed as a species of the economic theory of contract, what was said about the type of which economic theory is a token will apply to bargain theory as well.

---

[47] See Chapter One above.

[48] "While other features are of great relevance, consideration is the hallmark of contract. It is consideration which functions as a major test of contract; not the sole test, since the necessary intent must also be present. In other words, a promise to pay, give, etc., is nothing more than a bare undertaking, *nudum pactum*, which may bind a party's conscience, and effect him morally, religiously or otherwise, but never legally. Only if that promise is made for, or supported by ... something the law regards as consideration, will it amount to a contractual promise." GHL Fridman *The Law of Contract in Canada* (Toronto; Carswell) 1986) 9

[49] Lon L. Fuller 'Consideration and Form' (1941) *Columbia Law Review* 799-824, 814. Bufnoir's words come from his *Propiete et Contrat* (2nd Ed. 1924) 487

Another influential account of bargain theory and consideration portrays the requirement for consideration as a *formal* or *procedural* requirement.[51] The idea here is that the requirement of consideration serves an analogous function to the requirement that certain contracts and legal documents (contracts of guarantee and for the sale of land in most jurisdictions, and wills, for instance) be recorded in writing. It is easy to see why one might have these requirements as to form: the requirement of writing serves, for instance, an evidentiary function (the content of written contracts is likely to be easier to establish than that of their oral counterparts), and a cautionary function (the requirement of writing introduces an element of deliberation which might prevent parties taking on onerous obligations with insufficient reflection). These *reasons for having* the writing requirement are considerations of *substance*; they manifest or state purposes or social values which the legal system seeks to promote.[52] The requirement of writing itself, by contrast, generates considerations of *form*; it states considerations which go to the physical form or structure of contracts.[53] In determining contractual status on the basis of formal considerations, courts are not required (or, typically, permitted) to enquire either into the content of the contract (whether a contract is in writing will not depend upon its contents) nor into matters external to that document itself (though the writing requirement is motivated by such considerations, to the extent that the status of the document is to be settled by reference to its form, those external substantive reasons will be irrelevant). This will perhaps serve to show how the distinction between form and substance maps closely on to our distinction between ideals: Considerations of form are internalist and content-independent while considerations of substance are externalist and content-dependent. Fuller's claim is that consideration has in part at least a similar function to that of the requirement of writing - it is motivated by considerations of substance such as those suggested for the requirement of writing,[54] but generates considerations of form. Courts look to the presence of consideration in the same way and for similar reasons that they look for the presence of writing. The portrayal of consideration as a formal or procedural matter, then, amounts to an attempt to give an internalist content-independent account of that requirement. To the extent that the bargain theory of contract flows from the requirement for consideration, this account will portray the bargain theory as similarly internalist and content-independent.[55]

---

[50] Richard Posner 'Gratuitous Promises in Economics and Law' (1977) 6 *Journal of Legal Studies* 411

[51] For the classic statement of the view, see Lon L. Fuller 'Consideration and Form' (1941) *Columbia Law Review* 799-824. Fuller provides the formulation along the way to arguing that consideration has both formal and substantive dimensions, which he aims to 'disentangle'.

---

[52] For the distinction between form and substance, and an application to contract, see, as well as Fuller's article Duncan Kennedy 'Form and Substance in Anglo-American Law' [1976] 89 *Harvard Law Review* 1685-1778.

[53] Formal consideration commonly also go to the history or pedigree of a document or arrangement - the requirement that a piece of legislation be passed by a majority of Parliament, for instance, will be paradigmatic formal as will a requirement that the parties to a contract have consented to its content. These are *procedural* instances of form.

[54] Fuller was anxious to add to the cautionary and evidential reasons for the formal dimension a third, which he saw as 'one of the most important functions of form', viz., a *channeling* function: the dimension of form allows those who wish to create a certain relationship to 'plug into' a formula which will be easily recognisable for what it is: "In this aspect form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention." 'Consideration and Form' (1941) *Columbia Law Review* 799-824, 801. To these three the commentators on the second United States Restatement of Contracts have added another - a *deterrent* function "to discourage transactions of doubtful utility: *Restatement (Second) of Contracts* (1979) para 72 Comment (c)

This formal dimension of consideration allows us to see the point of a further rationale of bargain theory, to which we have already referred.[56] On this account bargain theory turns out to be a species of will theory. The idea is that the courts restrict contractual obligation to bargains or exchanges, since the payment of value is taken to be an indication of the presence of the requisite intention. As with will theory, bargain theory in this guise is tied closely to the internalist content-independent ideal. The point of contract is taken to be the furtherance of individual choices. The bargain theory derives from this view as a method of ascertaining where choices have indeed been made. The approach might seem, of course, to amount to a diminution of the significance of bargain or consideration, since they play a merely evidential role. What 'really matters' in contract is something like contractual intention or will. Lord Wright presented both the approach to bargain theory and the perception that it was a criticism when he wrote that a "scientific or logical theory of contract would ... take as the test of contractual obligation the answer to the overriding question whether there was a deliberate and serious intention ... to make a binding contract."

---

[55] See as well A.W.B. Simpson *A History of the Common Law of Contract* (Oxford University Press; Oxford, 1975) 316: "... the doctrine of consideration ... delimits the actionability of informal promises by *reference to the circumstances in which the promise in question is made.*" Simpson's italics. And also Cohen 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553, 582: "Consideration is, in effect a formality, like an oath, the affixing of a seal, or a stipulation in court ...."

[56] See Chapter One above.

Consideration was to function on this account not as "a condition of contract but is merely a piece of evidence."[57] The significance of Lord Wright's critique for our classificatory project takes us back to earlier concerns about the role of criteria in theory: in short, if we believe that consideration functions as criteria of obligation, we might think it irrelevant that the explanation for its selection as criteria looks to some concern which does not function directly in determinations of the existence and extent of contractual obligation. We might think that it is the criteria of obligation which does the work here, and not the explanation for the selection of that criteria.[58] For the moment, we need not settle the force of Lord Wright's critique, since on either account - whether we stress consideration or intent - the bargain theory will turn out to be internalist and content-independent.

These accounts have portrayed the bargain theory as a token of the internalist content-independent contract theory type. It will suffice for illustrative purposes to look briefly at the form of an account which seems to have the opposite effect. If bargain theory is to provide an internalist and content-independent account of contract it is crucial that the law does not inquire into the objective value of consideration. If the doctrine of consideration calls for an examination of the content of contracts to see that the exchange had been *equal* or *fair*, or for that matter *value maximising* by the lights of an external standard of these states of affairs, then clearly contract would be externalist and content-dependent. In fact the eschewal of such an inquiry is a central feature of the doctrine of consideration as formulated by the liberal conception of contract: " ... [T]he adequacy of the consideration is for the parties to consider ..., not for the court ...."[59] The idea here is that the courts will inquire as to is the *existence* of exchange, but will not determine that existence by reason of the *objective value* of the thing exchanged. The parties are taken to be the proper judges of such value. All of this of course is consistent with the liberal conception: if individuals *choose* to accept a peppercorn in payment, they will be taken to have evidenced their attribution of value to the peppercorn.[60] In fact however, there are cases in which the courts do seem to be examining the content of contracts to determine the reasonableness of the exchange. Where a father gave his daughter the deed to the house he shared with her, and received one dollar in return, the court was not prepared to find consideration: "To say that the one dollar was the real, or such valuable consideration as would of itself sustain a deed of land worth several thousand dollars, is not in accord with reason or common sense."[61] But of course this seems to involve precisely an examination of the content of the contract and an assessment of the objective value of the exchange - how can it be that a peppercorn will constitute consideration, but a dollar will not? The suggestion here is that cases such as this show that contract, understood in terms of the bargain theory, is externalist and content-dependent.

---

[57] Lord Wright 'Ought the Doctrine of Consideration be Abolished from the Common Law' (1936) 49 *Harvard Law Review* 1225, 1251

[58] We will also have occasion to consider the coherence of Lord Wright's picture of contract when we examine the idea that mental states might indeed function as criteria of obligation. See below Chapter Six below.

There may be a more direct route to this conclusion as to the type of bargain theory. We might think the rationale for the consideration requirement, and so for the bargain theory it spawns, is a concern for *fairness*. Here, in enforcing only those promises which had been purchased, courts would be marking the fact that those who had been paid for their promise acted unfairly in failing to perform: "One intuitive idea is that exchanges are enforced because one who welches on an exchange is a kind of cheat or thief: he has obtained a benefit and now refuses to pay for it."[62] Some support for this view is to be found in the lengths courts have gone to to find consideration where fairness seems to call for the imposition of obligation, but where the standard account of consideration seems to have prevented recovery. So where a worker suffered disabling injuries preventing the death or serious injury of his employer, the latter's subsequent promise to pay the worker a pension was held to be supported by consideration - the employer had received the benefit of being saved from death or grievous injury. But it is not clear how *that* can have been the price for the promise, since it was performed prior to the promise.[63] The court, however, seems to have been moved by the justice of the case, and were prepared to count the rescue as consideration by a convoluted process which had the effect of converting the employer's subsequent promise into a prior request. The most telling judgement in the case is the succinct concurring contribution of Samford J, which reads, almost in its entirety: "The questions involved in this case are not free from doubt, and perhaps the strict letter of the rule ... would bar recovery by Plaintiff, but following the principle announced by Chief Justice Marshall ..., where he says 'I do not think that the law ought to be separated from justice, where it is at most doubtful,' I concur ...."[64] If the proper account of bargain theory is grounded in consideration of fairness, or, perhaps more specifically, in the idea that a person who receives something of value for a promise acts unfairly if they renege, having obtained a benefit for nothing, then it may be proper to regard bargain theory as externalist and content-dependent.[65]

---

[59] *Bolton* v *Madden* (1873) LR 9 QB 55, 56 per Blackburn J

[60] The theory of value behind this view is of course derived from the subjective theory of value at the heart of classical economics. The peppercorn reference is drawn from Lord Somerville's majority judgement in *Chappell & Co. Ltd* v *Nestle Co. Ltd.* [1960] AC 87 (HL), 115, holding that chocolate bar wrappers could be consideration for the purchase of records: "A contracting party can stipulate for any consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn."

[61] *Fischer* v *Union Trust Co* 138 Mich 612, 101 NW 852 (1904), per Grant J. Compare *Thomas* v *Thomas* (1842) 2 QB 851, 114 Eng Rep 330 where it was held that though a desire to carry out the wishes of a deceased husband could not amount to consideration, being merely motive, an undertaking to pay one pound rent per annum could do so.

---

[62] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass., 1981) 29. Fried presents the view in order to reject it.

[63] Hence the general rule that 'past' consideration is insufficient; see e.g. *Roscorla* v *Thomas* (1843) 3 QB 234

---

[64] *Webb* v *McGowan* 27 Ala App 82, 168 So 196 (1935)

[65] The approach here may bring to mind the conception of justice as fairness presented and defended in John Rawls' *A Theory of Justice* (Harvard University Press, Cambridge, Mass., 1971)

6) The Reliance Theory of Contract

According to the reliance theory of contract, contractual obligation arises as the result of the inducement of 'detrimental reliance'. Where a promise has been made, and a promisee reasonably orders her affairs in reliance upon that promise in such a way that her interests will be harmed if the promise is not honoured, the promisee may be able to enforce the promise in contract. The second United States Restatement of Contract summarizes the principle in these terms:

> [A] promise which the promisor should reasonably expect to induce reliance or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise. The remedy granted for breach may be limited as justice requires.[66]

Both of these characterizations use the language of promise. On some accounts, such language is singularly appropriate, since they find in the reliance principle the form of a purified and defensible version of promise theory. The promissory construal of reliance theory looks to the theory's rejection of the doctrine of consideration. Providing there has been an inducement of detrimental reliance, contractual obligation may arise under the reliance model notwithstanding that the promisor has received no benefit from the promisee. Reliance theory then may allow a remedy for promises which have not been paid for; for which there has been no bargain or exchange. To the extent that the doctrine of consideration has troubled promise theory then, reliance theory has been seen in its promissory guise to offer a more defensible version of that account of contract.[67]

---

[66] The United States *Restatement (Second) of Contracts* (1979) para.90(1)

[67] See, for instance, Patrick Atiyah *Promises, Morals, and the Law* (Clarendon; Oxford, 1981). We will examine this aspect of his account of contract in detail in Chapter Eight below.

Applications of the reliance principle in contract doctrine seem to raise difficulties for this promissory interpretation. In the leading English case, for instance, the Court of Appeal found reliance-based obligation while accepting the trial judge's finding "that there was 'no definite assurance' by the defendant's representative, and 'no firm commitment'."[68] For our present classificatory purposes we probably do not need to settle which of the two accounts, that aligning reliance theory with promise or that rejecting such an alliance, is to be preferred, since both seem to give rise to accounts of contract which are externalist and content-dependent. If the reliance model does not require specific promises or undertakings, then it may seem to give less significance to the protection of the choice of promisors, and so to be distanced from what we have called the liberal conception of contract.[69] Whereas under that conception the point of contract was to protect and foster the capacity for choice - to facilitate the actions of agents conceived of as essentially choosers and planners - under the reliance model an agent may find herself subject to contractual obligation the existence and extent of which has been determined without regard to her choice. That determination will be made with regard to the choices another person has made in response to her statements and conduct.[70] Suppose reliance theory is properly construed as a version of promise theory. Here the justification for promissory obligation will look to the knowing inducement of reliance.[71] Whatever we think of this picture of promise, this much seems clear: Such a reliance based account of promise does not appear to rest obligation upon promise *per se* at all. Rather obligation will rest upon something external to the promise - the effect of the promise on the actions of the promisee. By the same token, obligation will be content-dependent - it will depend upon the significance for action the content of the promise is taken to have by its audience. Patrick Atiyah makes the point in language which might seem especially relevant to our inquiry when he says that on the reliance view of promise "what the promisee relies upon is not the binding quality of the promise, but some assertion-content of the promise."[72]

---

[68] *Crabb* v *Arun District Council* [1976] Ch 179, 189, per Lord Denning MR

[69] Hugh Collins makes this point in striking fashion when he writes this: " A ... fundamental reason for the development of the reliance model stems from a redefinition of the proper scope of personal autonomy. Instead of envisioning society as a collection of antagonistic individuals trading exclusively in the light of self interest, the modern law perceives society as a co-operative groups on individuals co-existing in relations of interdependence and trust. The role of the law is not simply to facilitate exchanges, but to regulate relations of dependence and to prevent abuses of trust." *The Law of Contract* (Weidenfeld & Nicholson, London, 1986) 45

[70] Brian Coote 'The Essence of Contract Part I' (1988) 1 *Journal of Contract Law* 91-112, 106: "... the reliance theory bases contractual obligation, not on what a promisor said or did, but on the reactions of another to those things." Coote regards this feature as an indication that reliance theory is not an adequate contract theory at all, rather than supposing it to bear upon what type of contract theory it might be.

We can reinforce this conclusion as to the theory-type of reliance theory, by noting the effect of the presence in judicial and legislative formulations of the reliance principle, of qualifying terms such as 'reasonable' and 'justifiable'; the Restatement allows recovery only where the promisor should 'reasonably expect' her conduct or words to induce reliance, and where 'injustice can be avoided only if the promise is enforced'. The point of these terms is clear enough: "Clearly", wrote Morris Cohen, "not all cases of injury resulting from reliance on the word or act of another are actionable, and the theory before us offers no clue as to what distinguishes those that are."[73] The theory at least purports to draw this distinction by limiting recovery to those cases which in which reliance satisfies the qualifying terms and phrases noted. Whatever the point of the terms, however, it is clear that their effect is to direct inquiry beyond the mere fact of reliance itself, to a set of standards and principles of justice and reasonableness. Recovery depends not upon reliance, but upon whether a disappointed promisee is able to satisfy a court that by the lights of an external theory of justice or reasonableness her reliance warrants the imposition of obligation. These 'vague standards', writes Hugh Collins:

---

[71] See especially Neil MacCormick 'Voluntary Obligations and Normative Powers' (1972) Supp. Vol. 59 *Proceedings of the Aristotelian Society* 59

[72] Patrick Atiyah *Promises, Morals, and the Law* (Clarendon; Oxford, 1981) 64

[73] Morris Cohen 'The Basis of Contract' (1933) 46 Harvard Law Review 553, 579

> ... merely alert us to the fact that the court is balancing competing policies when determining the province of legal enforceability under the reliance model. Unlike the exchange model, the rules do not purport to be simple and rigid; instead the reliance model adopts an explicit discourse of open ended standards to judge the reasonableness of reliance.[74]

The presence of terms such as 'justifiable' and 'reasonable' in standard formulations of the reliance principle, then, make clear that the reliance model is externalist. Determinations of the existence and extent of contractual obligation under the theory require reference beyond the contract itself to external standards of reasonableness and justice.

7) The Reasonable Expectations Theory of Contract

This theory of rests contractual obligation upon the reasonable expectations of performance induced by a promise or undertaking, and the disappointment of those expectations occasioned by nonperformance or breach. For our purposes, we may attribute the theory to Adam Smith, who is reported to have said that:

> ... the obligation of contracts ... arose entirely from the expectation and dependence which was excited in him to whom the contract was made.... [D]eclaration of will or intention of a person could not produce any obligation in the declarer, as it did not give the promisee a reasonable ground

---

[74] Hugh Collins The Law of Contract (Weidenfeld & Nicholson, London, 1986) 38

> for expectation. It is the disappointment of the person we promise to which occasions the obligation to perform it.[75]

This passage indicates that Smith turns to expectations theory because of his perception that a will theory of promise alone cannot explain promissory obligation. More recently expectations theory has seemed attractive since it seems singularly consistent with the damages rule, noted earlier, which sets the quantum of contract damages by reference to the victim's expected benefit from the contract.

It is common to run expectations and reliance theory together.[76] In some sense this is no doubt sound - an expectation after all might be a form of reliance. The two theories, however, do highlight different aspects of contractual obligation and these differences may seem to bear upon the classification of the theories. One reason for supposing that reliance theory was externalist, was the fact that obligation arose not directly from a promise or statement of intention by one of the parties, but from some phenomena external to that promise or statement, namely the promisee's reliance. This feature of reliance theory may be highlighted by giving it a 'temporal' formulation - to the extent that reliance theory requires some act of reliance, that theory seems to create at least the potential for 'an awkward hiatus' between the making of a promise or statement of intention and the creation of obligation:[77] It may take some time before a promisee actually does anything in reliance upon a promise. Expectations, however, may be thought to arise instantaneously with the promise, so, to the extent that obligation depends upon expectation, the promise is binding *ab initio*. In this respect expectations theory seems better able to explain the bindingness of *executory contracts*: contracts in which there has been no performance but only an exchange of promises.[78] If what matters for the purposes of classification is that the obligation arise 'from the promise' this temporal distinction may seem important. Perhaps expectations theory is internalist. The fact that expectations can be construed as a form of reliance seems to show this to be false. Though expectations theory places the incidence of contractual obligation in some sense 'closer' to the promise, still its origin is external to the promise itself. Like reliance theory, expectations theory down-plays the significance of *choice* in the creation of contractual obligation . The determination of obligation looks not to the choices of an agent but to the response to her actions and statements by others: "It is the disappointment of the person we promise to which occasions the obligation to perform."[79] Expectations theory supposes, then, that obligation arises not directly from a promise or an undertaking itself, but rather from something external to the promise or undertaking, and to this extent shares reliance theory's status as externalist and content-dependent.

---

[75] Adam Smith *Lectures on Jurisprudence* ed. Meek, Raphael, & Stein (Oxford; Clarendon Press, 1978) 92, see also 87. This text is a collection of student's notes of Smith's 1762-3 Glasgow lecturers on jurisprudence, hence the 'is reported to have said' in the text.

[76] See on this P.S. Atiyah *Promises, Morals, and the Law* (Oxford; Clarendon Press, 1981) 39-48

[77] Ibid 39. See as well Neil MacCormick 'Voluntary Obligations and Normative Powers' (1972) Supp.Vol. 46 *Proceedings of the Aristotelian Society* 59-78

8) The Relational Theory of Contract.

---

[78] Briefly, the distinction between *executory* and *executed* contracts marks different ways in which *A* might buy *B*'s promise. Consideration is called executory when *B*'s promise is made in return for a counter-promise by *A*, and executed when it is made in return for the performance of an act. An agreement between a vendor and purchaser for the sale of goods for future delivery on a COD basis is a common example of the former. At the time the agreement is made, nothing has been done to perform the mutual promises which comprise the bargain, but from that moment there is an immediately binding contract from which neither party can withdraw, though performance cannot be claimed until the appointed time. The rule that such mutual promises can amount to consideration so as to generate this 'immediate obligation' has long been settled: See eg. *Pecke* v *Redman* (1555) 1 Dyer 113; *Joscelin* v *Shelton* (1557 3 Leon 4; *Manwood* v *Burston* (1586) 2 Leon 203; *Harrison* v *Cage* (1698) 12 Mod 214.

[79] Adam Smith *Lectures on Jurisprudence* ed. Meek, Raphael, & Stein (Oxford; Clarendon Press, 1978) 92

The relational theory of contract, under that name at least, is most closely associated with the work of Ian Macneil,[80] although Macneil is by no means its only source or champion.[81] Macneil begins from the idea that certain features of the human situation lead us to require a medium for "projecting exchange into the future", for making commitments now which will be fulfilled sometime hence. That facility, Macneil calls contract. He writes this:

> By contract I mean no more and no less than the relations among parties to the process of projecting exchange into the future. ... A sense of choice and an awareness of future regularly cause people to do things and to make plans for the future. When these actions and plans relate to exchange, it is projected forward in time. That is, some of the elements of the exchange, instead of occurring immediately, will occur in the future. This, or rather the relation between people when this occurs, is what I mean by contract."[82]

The account of contract Macneil is concerned to debunk, and which we may for the moment regard as analogous to the liberal conception, supposes this facility to be solely and inevitably promissory. But Macneil argues that there are in addition to 'promissory exchange-projectors' a great many nonpromissory projectors. In all societies, he writes:

> ... custom, status, habit, and other internalizations project exchange into the future. In some primitive societies these may be the primary projectors, with promise relating to exchange playing only a very minor role, if that. Moreover we err if we

---

[80] For a representative selection of articles, see 'The Many Futures of Contract' (1974) 47 *Southern California Law Review* 691-816; 'Restatement (Second) of Contracts and Presentiation' (1974) 60 *Virginia Law Review* 589-610, 'Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neo-Classical, and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854-905. For Macneil's books see *Contracts: Exchange Transactions and Relations* 2nd ed. (Mineola; Foundation press, 1978), and *The New Social Contract* (New Haven & London; Yale University Press, 1980). This last book may be regarded as the cumulative statement of the theory.

[81] See in particular Stuart Macaulay 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55-67. Useful and sympathetic secondary literature includes Peter Linzer 'Uncontracts: Context, Contorts and the Relational Approach' [1988] *Annual Survey of American Law* 139-198, and Wallace Lightsey 'A Critique of the Promise Model of Contract' (1984-1985) 26 *William and Mary Law Review* 45-73

[82] *The New Social Contract* (New Haven & London; Yale University Press, 1980) 4

> fail to recognise that such nonpromissory mechanisms continue to play vital party in the most modern and developed of societies.[83]

On Macneil's account, then, a proper account of contract, must have regard to nonpromissory projectors, such as custom, habit, command hierarchies, and expectations created from status quo such as markets. The liberal conception's error in this regard is highlighted by its view that the contractual paradigm is a *radically discrete* transaction, a transaction in which no duties or relationship exists between the parties prior to the contract, in which the contract itself specifies the duties which obtain between the parties for the duration of the contract, and in which no duties remain between the parties once the contract is performed.[84] Two features of the discrete paradigm are especially relevant to our present inquiry. First, the paradigm posits that the existence and extent of contractual obligation flows from the contractual moment itself. Contractual rights and duties are not to be settled by looking at factors other than the discrete contractual exchange.[85] Second, this concentration on the discrete exchange leads relational theory to disregard contractual content: The emphasis upon discrete transactions,

---

[83] Ibid 7

[84] "The paradigmatic contract of neoclassical economics and of legal analysis is a discrete transaction in which no duties exist between the parties prior to the contract formation and in which the duties of the parties are determined at the formation stage. Prior to their contract Smith had no duties to Brown; at the time they enter into their agreement, in a single joint exercise of their free choice, they determine their respective duties to each other for the duration of the agreement; completion of the promised performance terminates party's obligations." Victor Goldberg 'Toward an Expanded Economic Theory of Contract' [1976] 10 *Journal of Economic Issues* 45-61, 49

[85] "Promise theories concentrate on the promise itself or the actual or likely effects of the promise as the fount of the promisor's duties and the promisee's rights. Actually, however, these duties and rights are created, restrained and molded by the interplay between the contract and the surrounding social context, as well as by the development of the contractual relationship itself." Wallace Lightsey 'A Critique of the Promise Model of Contract' (1984-1985) 26 *William and Mary Law Review* 45-73, 49

Macneil writes, creates "... the need to equate the substance of the transaction with the promises, the consensual planning, creating it."[86]

Macneil rejects this discrete paradigm. Most contracts he claims are much more 'intertwined' or 'relational' than the paradigm supposes. Parties often deal with one another over long periods. Their current transaction is often based upon or 'intertwined' with previous and anticipated dealings. Their current transaction is likely to have many unsettled aspects which will have to be determined during the course of ongoing relationships. This need to view contract in the context of ongoing relationships, Macneil claims, leads us to a quite different set of contract values than that promoted by the liberal conception. Whereas under the discrete paradigm there is little or no need for trust or co-operation, since everything is settled immediately, according to the relational approach contracts "lack measurability of content, duration, and the like. They require much future cooperation, involving sharing of benefits and burdens, and require much trust."[87] Once we reject the discrete paradigm, the idea goes, we will see that the contractual obligation depends upon these external values, which arise not from the contract itself, but from the broader relationship between the parties and its social context. We can see where this puts Macneil's theory of contract with respect to our ideal by noting what Macneil has to say about the nature of contractual obligation under the relational approach. He writes this:

> Modern contractual relations tend to combine kinds of obligations associated with the discrete transaction, with those associated with primitive contractual relations. Thus the sources of the content of the obligations of both the promises of the parties and those arising otherwise than from the transaction itself.[88]

---

[86] *The New Social Contract* (New Haven & London; Yale University Press, 1980) 61-62
[87] Ibid 17
[88] Ibid 28

For the moment, then, it will do to say this: The relational approach is paradigmatically externalist and content-dependent. It is founded precisely upon a critique of the internalism of the liberal conception and of that conception's concentration upon the contract itself as the sole source of contractual obligation. Once we see the shortcomings of the discrete paradigm, we will see, according to the approach, that the determination of contractual obligation requires appeal to values which obtain independently of any particular contract.

9) Substantive Fairness Theory

Randy Barnett defines a substantive fairness theory of contract as one which "evaluates the substance of an agreement to see if it is fair."[89] Hugh Collins might seem to provide an example of a such a theory. According to Collins an adequate comprehension of the modern law of contract requires recognition that contract has adopted a new set of underlying moral values. The liberal conception, on Collins' account, has given way to a modern law of contract which values liberty "only when it achieves a proper balance between, on the one hand, a respect for individual dignity and equality and, on the other, a fair distribution of wealth, the avoidance of unjustifiable domination, and a duty to respect the interests of others."[90] Modern contract determines contractual obligation by appeal to these 'communitarian values'. We have seen an example of Collins' perception of the effect of this approach in his account of the rationale for reliance-based obligation. The courts, he writes:

> ... do not hesitate to attribute responsibility where they believe that the defendant should have acted to take into

---

[89] Randy E. Barnett 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 283

[90] Hugh Collins *The Law of Contract* (Wiedenfeld & Nicolson; London, 1981) 15

> account the interests of another. Being in a position to act but keeping silent or initiating the events which induce reliance bring the defendant within the orbit of contractual responsibility. Fairness in this context involves a balancing of the the value of personal autonomy with a duty to respect the interests of others.[91]

It is clear enough where such theories belong in our taxonomy - they are paradigmatically externalist and content-dependent. For the most part, indeed, we have spoken of the standards to which externalist theories appeal, as standards of fairness or justice in distribution and exchange, so portraying them as moral standards. This characterisation is typically accurate enough. Michael Sandel, for instance, assumes an identity of externalism and an appeal to standards of fairness when he distinguishes between two views of contract in these terms:

> Where [one view] points to the contract itself as the source of obligation, [the other] points through the contract to an antecedent moral requirement to abide by *fair* arrangements, and thus implies an independent *moral* principle by which the *fairness* of an exchange may be assessed.[92]

The assumption that there is an identity between fairness theory and externalism explains why, within contemporary legal and contract theory, at least, substantive fairness theory often seems to have been associated with a negative thesis which we touched upon in the previous chapter. If we hold to this identity, then it will seem to us that an argument against the internalist content-independent theory type is an argument in favour of a fairness approach to contract. The only remaining type will be externalist and content-dependent. To the extent that tokens of type inevitably direct attention to concerns of fairness, and to the extent that theory is required to mediate between type or ideal and doctrine,[93] contract theories will inevitably be fairness theories. Anthony Kronman's contribution to contract theory is an example. According to Kronman, the procedural system which on the liberal conception is supposed to secure content-independence and internalism, to act as a buffer between contract and distributive concerns, fails to do so since one of its central notions, voluntariness, itself requires reference to external moral standards. Given this, Kronman argues, contract is inevitably concerned with "a fair division of wealth among the members of society."[94]

---

[91] Ibid 55

[92] Michael Sandel *Liberalism and the Limits of Justice* (Cambridge; Cambridge University Press, 1982) 107. See for a judicial example of the same assumption *Hart* v *O'Conner* [1985] AC 1000; [1985] 1 NZLR 159, 166 (PC). The relevant passage, from the speech by Lord Brightman, is quoted above Chapter One footnote 23.

The possibility of, for instance, an externalist reading of the economic theory of contract,[95] or of the form of externalist justification of promise favoured by Joseph Raz,[96] however, might seem to show that the connection between externalism and concerns of fairness is merely contingent. The economic theory of contract might seem to rely upon an external standard of efficiency, and so count as an externalist, but the external standard is at least not presented as a standard of fairness of justice. Barnett's remark that certain types of contract theories "... evaluate the substance of a contractual transaction to see if it conforms to a standard of evaluation the theory specifies as primary. Economic efficiency and substantive fairness are two such standards"[97] is presumably to be explained by Barnett's adherence to some such view of the distinction between externalism and fairness. On this account a different, positive, form of argument for substantive fairness seems to be required. We will examine attempts to provide such arguments below.

---

[93] We examine this assumption in Chapters Four and Five below.

[94] Anthony Kronman 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472-511. We examine Kronman's argument to this end in detail in Chapter Four below. Note here that Collins, too, argues that the picture of law as a system of rules has been abandoned by modern law. Hugh Collins *The Law of Contract* (Wiedenfeld & Nicolson; London, 1981) 15-21.

[95] See Chapter One.

[96] See this Chapter, footnotes 31-33 and accompanying text.

[97] Randy E. Barnett 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 277

For the moment they make no difference to our conclusion as to the theory type of which substantive fairness theory is a token.

Chapter Three

Randy Barnett's Alternative Taxonomy

This thesis has claimed that contract theories can usefully be treated as tokens of one or other of two theory types, one internalist and content-independent and the other externalist and content-dependent. In the course of defending his consent theory of contract Randy Barnett has argued that there are three types of contract theories.[1] It will be useful to examine his arguments for this alternative taxonomy.

Barnett is concerned to criticise what he identifies as the 'five most popular theories of contractual obligation' - will, reliance, efficiency, fairness, and bargain theories. These theories are said to exemplify three contract theory types. Will and Reliance theories are *party-based*, efficiency and fairness theories are *standards-based*, and bargain theory is *process-based*. Barnett's critique is two-pronged; he is concerned to assess the adequacy of both the theory types and the examples. At the end of the day, Barnett claims that only process-based theories are plausible, and that the theory he champions, consent theory, is the only plausible token of this theory type.

---

[1] Randy E Barnett 'The Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 271-291

The overall strategy, then, is to argue that his theory is the only adequate token of the only adequate contract theory type.[2]

As we have seen, Barnett defines a standards-based theory as a theory "which evaluates the substance of a contractual transaction to see if it conforms to a standard of evaluation that the theory specifies as primary."[3] Process-based theories, by contrast, "shift the focus of the inquiry from the ... substance of the parties' agreement to the manner in which the parties reached their agreement. Such theories posit appropriate procedures for establishing enforceable obligations and then assess any given transaction to see if these procedures were followed."[4] It will be clear that Barnett's standards and process-based theory types are substantially equivalent to our two theory types. Substance-based theories specify independent standards in light of which the content, or substance, of contracts is assessed in order to determine the existence and extent of contractual obligation. Process-based theories eschew inquiry into the content of contracts; provided a contract has satisfied the specified procedural requirement obligation will arise independently of its content. The inquiry is internal, into the form of the contract itself.

Barnett's taxonomy differs from ours, then, primarily in the postulation of the third, party-based, theory type, and for the moment that theory type is our primary concern. Party-based theories, Barnett claims, restrict their attention to only one of the parties to a contract. He writes that:

> Theories described here as party-based are those that focus on protecting one particular party to a transaction. A more accurate (though more awkward) label is 'one-sided

---

[2] We will qualify this characterisation of Barnett's project when we examine his positive theory in Chapter Seven below.

[3] Randy E Barnett 'The Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 277

[4] Ibid 287

> party-based'. Will theories are primarily concerned with protecting the promisor. Reliance theories are primarily concerned with protecting the promisee.[5]

According to Barnett, the tendency to place 'undue emphasis' upon only one of the parties to a contract, creates insoluble problems for party-based theories. The argument to this conclusion proceeds from a criticism of the tokens to a criticism of the type. The criticism of the tokens is that both of the party-based theories he considers must ultimately supplement their 'core notions', of will and reliance respectively, with some extra factor. We have already seen this criticism levelled at reliance theory. The idea was that reliance theorists must acknowledge that reliance alone will not do the whole job, since detrimental reliance will not *always* allow a remedy. At the very least, reliance must be 'justifiable', or 'reasonable', and, the argument goes, reliance theory alone cannot supply us with the application conditions for these supplementary terms - "whether justifiable or unjustified, reasonable or unreasonable, reliance is present in any event."[6] We will look at the analogous claim against will theory in more detail below.

For the moment, it will do to say that, according to Barnett, both will and reliance theories fail because they must turn to considerations which do not follow either from will or reliance, "but are based on more fundamental principles that are left unarticulated."[7] Barnett connects these specific points, and the criticism of party-based theories as a type, with the assertion that the articulation of these more fundamental principles will *only* be possible once we recognise the "interrelational quality of the process of contracting."[8] The fact that will and reliance theories are one-sided party-based then - the fact, that is, that they deny the *interrelational* quality of the process of contracting - prevents them giving an adequate account of contract. Barnett writes that:

---

[5] Ibid 271

[6] Ibid 275

[7] Ibid 276

[8] Ibid 277. Empahsis added.

> ... neither [will nor reliance theory] provides an adequate moral framework to explain the legal enforcement of contracts.... In liberal political and legal theory, the interrelational quality of social life is facilitated by identifying the entitlements or property rights of individuals in society. Theories that focus exclusively on the will of promisors or the reliance of promisees fail to utilize this conceptual framework. Not surprisingly, attempts to explain contractual obligation arising between persons go awry when those attempts ignore the foundations of interpersonal legal relationships.[9]

Assessment of Barnett's extra type is hindered by an ambiguity in its presentation. In his definition of the theory type, given in the second to last quoted passage, he spoke of theories concerned to *protect* one particular party to a contract. In this last quoted passage he speaks of theories which *focus exclusively on the will of promisors or the reliance of promisees.* If the theory type depends upon the latter practice, then it is founded upon a simple mistake - neither will nor reliance theories are 'one-sided party-based' in that sense. We have already seen why this is true of will theory. As a theory of contract, will theory inevitably required a *union* of two or more wills. Recall Holland's remark that:

> ... acts which are directed to the production of a legal result ... may be either one-sided, where the will of only one party is involved, or two sided, when there is a concurrence of two or more wills in producing a modification of the rights of the parties concerned. Such a two-sided act, having for its function the creation of a right is a 'contract'....[10]

Similarly, in what is commonly taken to be the principle judicial statement of the will theory, Kindersley VC says that:

---

[9] Ibid

[10] T.E. Holland *Jurisprudence* (London; Clarendon Press, 1846) 225. See Chapter Two above, fn 4 .

> When both parties will the same thing, and each communicates his will to the other, with a mutual agreement to carry it into effect, then an engagement or contract between the two is constituted.[11]

Finally, note again Savigny's definition of a contract, explicitly relied upon by Pollock in the early editions of his text, as "the union of several persons in a coincident expression of will by which their legal relations are determined."[12] These passages, and the numerous others they mirror, should make us doubt the adequacy of Barnett's characterisation of will theory as one-sided party-based. We will see that there are many good reasons to doubt the adequacy of the will theory of contract, but there is little reason to think that that theory is blind either to the fact, or to the significance of the fact, that contracts always involve more than one person.

Perhaps it will seem unlikely that Barnett could really be guilty of such a straightforward mischaracterisation of will theory. It might seem more likely that Barnett's position has been misrepresented. The suggestion that he *is* guilty of this mischaracterisation becomes a little more plausible, I think, once we see what might lead Barnett to characterise will theory as he does. The characterisation flows, I suspect, from the fact that Barnett treats will and promise theory as equivalent. Will theories, he writes;

> ... maintain that commitments are enforceable because the promisor has 'willed' or chosen to be bound .... In this approach, the use of force against a reneging promisor is morally justified because the promisor herself has warranted the use of force by her prior exercise of will.[13]

In this passage and the numerous others it echoes, Barnett simply conflates will and promise theory. I do not wish to suggest that promise theory is properly characterised as party-based in Barnett's sense. There is however an account of promise which does seem to see promise as primarily concerned with *promisor's* obligations. John Simmons suggests just this when he writes that "[t]he primary purpose of a promise is to undertake an obligation; the special rights which arise for the promisee are in a sense secondary."[14] If we accept this view of promise, then much of what Barnett says about party-based theories will be applicable to that institution. I suspect Barnett does think of promise in this way, and that his conflation of will and promise theory leads him to simply ignore or overlook the clear evidence that will theory has never supposed that one-sided acts of will could create or sustain obligations.

---

[11] *Haynes* v *Haynes* (1869) 1 Dr & Sm 426, 433, 62 ER 442, 445

[12] Sir Frederick Pollock *Treatise on the General Principles Concerning the Validity of Agreements* (London; Stevens & Son, 1876). Friedrich C. von Savigny *Das Obligationenrecht* (1851) Book 2, Chapters 7. See Chapter Two above, footnote 7.

[13] Randy E Barnett 'The Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 272

It might seem less clear that the one-sided party-based theory type rests upon a mistake or mischaracterisation if we look to Barnett's 'alternative definition', in terms of a theory's concern to *protect* or *further the interests* of one rather than both of the parties to a contract. But this definition does not seem to capture will theory either. For the moment suppose Barnett is correct in treating will and promise theories as equivalent. The 'unilateral-protection' classification would be falsified by an example of promise theory which justified promissory obligation by reference to its tendency to protect and further the interests of both promisors and promisees. Such accounts are legion (indeed they may be exhaustive). Any consequentialist account of promise is likely to qualify, to the extent that it values promise because of its tendency to promote cooperation, where cooperation is taken to have high utility.[15] Even Charles Fried, defending an deontological account of promise which, we have seen, he explicitly describes as a version of will theory, takes it that promise rests upon a social convention the point of which is to secure *mutual confidence* that promises will be kept. On each of these accounts the point of promise is not simply to further the interests of one party to a particular promissory transaction, but to promote the interests of members of communities which have an institution of promise - promisors, promisees, actual and potential both. We may be suspicious of the ability of these accounts of promise to give an adequate account of promissory obligation. But whatever we think of that matter, the nature of the accounts raise doubts, I suggest, about the adequacy of a characterisation of will theory as unconcerned with the interrelatedness of promissory principles.

---

[14] John Simmons *Moral Principles and Political Obligation* (Princeton University Press; Princeton, 1979) 76

[15] A useful presentation of such accounts is to found in P.S. Atiyah *Promises, Morals, and Law* (Oxford; Clarendon Press,1981) 29-79

Barnett is I think equally mistaken as to the nature of reliance theory. Though that theory certainly places less weight on an act of choice of the 'promisor' than theories at the core of the liberal conception, no version of the theory supposes that a reliance-based obligation can arise with *no* interrelation between the parties. We can come at this proposition from a number of directions. First, paragraph 90(1) of the *Restatement*[16] is quite representative of formulations of the reliance principle when it specifies that the discretion to find reliance based obligation will only arise where a promisor should *reasonably expect* her promise *to induce* reliance by promisees or third parties. These phrases require a nexus between promises or statements of intention and acts of reliance. The proposition is further supported by the external factors which led to our classification of the theory as externalist and content-dependent. At the very least, the stipulation that reliance be 'reasonable' or 'justifiable' requires a similar nexus or interrelation. Simply put, principal factors in the determination of whether reliance has been reasonable or justifiable include the nature of the relationship between the parties.[17] We might be prepared to grant even greater significance for the current discussion to these external factors. Hugh Collins does so when he argues that a 'fundamental reason for the development of the reliance model' was the rejection of the perception of society as a 'collection of antagonistic individuals trading exclusively in the light of self interest.' The modern law, Collins writes " ... perceives society as *co-operative groups* of individuals *co-existing in relations* if *interdependence* and trust.[18] The emphasised terms stress the interrelatedness of the reliance model on Collins' account. On such an account, then, still less is it appropriate to perceive of reliance theory as concerned with the interests of only one party to the contractual relationship.

---

[16] *Restatement (Second) of Contracts* (1979)

Collins' account connects with a broader difficulty with Barnett's classification of these theories as one-sided party-based. We have seen that Barnett links his criticism of the theory tokens with a criticism of the theory type which claims that type itself is implausible since it denies the 'interrelational quality of the process of contracting'. We have already had a hint of how Barnett supposes the interrelational quality of contract must be recognised: "In liberal political and legal theory", he wrote, "the interrelational quality of social life is facilitated by identifying the entitlements or property rights of individuals in society."[19] We will turn to Barnett's positive theory in more detail shortly. At this point I simply want to draw attention to a possible objection to Barnett's approach which connects directly with this appeal to the importance of an appreciation of the interrelational quality of contract. For it will seem to many that the implication of this criticism, coupled with positive remarks such as that just quoted, is that the *only* way to recognise the interrelation quality of human life is by recognising rights and, more specifically given Barnett's presentation of the favoured rights theory, by recognising property rights. But this is much too quick. It simply begs the question against those who claim that rights theories are *inconsistent* with a full recognition of the interrelational nature of human community. Michael Sandel makes this point in dramatic terms when he writes that:

---

[17] See for instance *BML Corp* v *Greater Providence Deposit Corp* 495 A.2nd 675(RI 1985) where defendant had by a letter to its client made a conditional offer of finance to allow its client to purchase plaintiff's business. Upon seeing this letter plaintiff took his business off the market and stopped operations. The sale fell through and plaintiff sued for losses suffered as a result of these last actions. It was held unreasonable of the plaintiff to have relied upon the defendant's letter to a third party.

[18] Hugh Collins *The Law of Contract* (Weidenfeld & Nicholson; London, 1986) 45. Emphasis added

[19] Randy E Barnett 'The Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 277

> ... justice can be primary only for those societies beset by sufficient discord to make the accommodation of conflicting interests and aims the overriding moral and political consideration; justice is the first virtue of social institutions not absolutely, as truth is to theories, but only conditionally, as physical courage is to war zones.[20]

Sandel's point here is that it is only once we have *lost* a fully or properly interrelated community that rights-based relations appear attractive to us. Far from being the only way to attain the desired community, the reliance upon rights-theory is taken by this approach to be a sign of the loss of that community. I do not wish to endorse this communitarian approach. For now I merely raise it to show that Barnett's conclusions about the significance of a recognition of the interrelational nature of contract are drawn much too quickly.

The arguments of the last few pages attempted to show that neither of the tokens of the type 'one-sided party-based contract theories' are in fact properly regarded as tokens of that type. Barnett does not succeed in showing that either will or reliance theories are party-based. One result of this conclusion, somewhat incidental to our current 'typological' concern, is that we should not accept Barnett's rejection of will and reliance theories *because* they are party-based. His arguments that they are properly so regarded are flawed. Beyond this, the arguments may seem to have shown that the 'one-sided party-based' contract theory type is, at best, otiose. We do not need the type since it has no tokens. Barnett, at the very least, does not present a convincing argument for this component of his taxonomy. I hope to have said enough above to indicate how we *should* classify will and reliance theories.

---

[20] Michael J. Sandel *Liberalism and the Limits of Justice* (Cambridge University Press; Cambridge, 1982) 31

Chapter Four

Anthony Kronman and Contract Theory Types

Anthony Kronman's 1980 article 'Contract Law and Distributive Justice'[1] has become something of a classic in the philosophy of private law. Kronman's thesis in the part of that article with which we are concerned is that libertarians cannot give an adequate account of contract law without violating their own injunction against appeal to distributive end-states. The law of contract, according to Kronman, is *necessarily* concerned with distributive justice - necessarily concerned, that is, with the "fair division of wealth among the members of society."[2] Our discussion so far will, I hope, have made it clear why Kronman's argument has attracted the attention of anthologisers and commentators.[3] If successful, the argument would undercut what we have called the liberal conception of contract. According to that conception, contract law derives from a special respect for individuals and their choices. Contractual adjudication does not provide an opportunity for the consideration of wider political and moral issues which are not the immediate concern of the parties in dispute, or for consideration of even those features of the parties or their relationship which have not been made, through the exercise of choice, matters of essence to the contract. Kronman's argument, then, bears in a general way upon the political and philosophical issues which provide the background for this study.

---

[1] Anthony T Kronman 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472. In fact it is the first part of the article, from pages 475-497 which has become something of a classic. The second part, from pages 498-511, has attracted relatively little attention. This Chapter will do nothing to redress this imbalance.

[2] Ibid, 472

[3] For commentators see, for instance, W.N.R Lucy 'Contract Law as a Mechanism for Distributive Justice' (1989) 9 *Oxford Journal of Legal Studies* 132; Jeffrie Murphy and Jules Coleman *Philosophy of Law* Revised Ed. (Westview; Boulder, San Francisco, London, 1990) 169; Larry Alexander and William Wang 'Natural Advantages and Contractual Justice' (1984) 3 *Law and Philosophy* 281-297, Megan Richardson 'Contract Law and Distributive Justice Revisited' (1990) *Legal Studies* 258-270; William Wang 'Reflections of Contract Law and Distributive Justice: A Reply to Kronman' (1982) 34 *Hastings Law Journal* 513-527. For

Kronman's argument bears, as well, more specifically upon the analysis proffered by this thesis. The idea that contract theories are tokens of one of two theory types has, of course, been at the heart of our discussion. Kronman's argument, we will see, can properly be read as concerned to show that no adequate internalist content-independent account of contract can be given. Kronman argues, in effect then, that contract is necessarily externalist and content-dependent. I want to do two things in this chapter. First, I want to suggest that commentators have often misunderstood the structure of Kronman's argument. I hope to provide a more accurate reading. With this reading to hand, we will be in a position to see what an adequate response to Kronman would look like. The second thing I try to do is to provide such a response. My ultimate concern is to question Kronman's conclusion as to the impossibility of an adequate internalist content-independent account of contract. I shall argue that Kronman's criticism of that theory type is mistaken. Kronman's argument relies at a crucial stage upon W.B. Gallie's *essentially contested concepts* doctrine.[4] But that doctrine does not support

---

anthologies see, for instance, Joel Fienberg and Hyman Gross *Philosophy of Law* 3rd ed. (Wadsworth,1986).

[4] W.B. Gallie 'Essentially Contested Concepts' (1956) 56 *Proc. Aristotelian Society* 167

Kronman's argument. Indeed, I argue, it militates less toward externalist content-dependent theories of contract than it does toward their internalist content-independent alternatives.

We will usefully begin by reminding ourselves of some of the central features of our two theory types, in order to make clear how the internalist content-independent type is bought into question by Kronman's argument. We began with the idea that what we called the liberal conception of contract derived from a special respect for the choices of individuals. Contractual obligation, according to this conception of contract, was based upon the *fact* and not the *content* of choice. What matters, according to the liberal conception is whether or not the parties have agreed, and not what it is to which they have agreed. The liberal conception of contract, then, gave an account of contract which was *internalist*, where what is meant by that is that it looked to the contract or agreement itself to determine contractual obligation, and *content-independent*, where what is meant by that is that it eschewed appeal to contractual content to determine such obligation. I suggested that those theories which stood in opposition to the liberal conception could usefully be treated as tokens of an *externalist content-dependent* theory type. From the perspective of this type what matters is not whether parties have agreed, or consented, or promised, or what-have-you, but instead whether that to which they have agreed is fair or just. Such an approach to contract requires a standard of fairness or justice in contract. Determinations of the existence and extent of contractual obligation are made by reference to that standard rather than to the agreement or contract itself. Here contractual obligation derives not from the fact of agreement, but from the consistency of the content of agreement with an external standard of contractual obligation. To quote Sandel again, where one approach to contract "points to the contract itself as the source of obligation, [the other] points *through* the contract to an antecedent moral requirement to abide by fair arrangements and thus implies an independent moral principle by which the fairness of an exchange may be assessed."[5]

As we have seen, the stress upon *choice* which marks the liberal conception, is often manifest in contract theory and doctrine by a requirement that entry into a contract be *voluntary*. We looked at the central doctrinal manifestations of this requirement in Chapter One. The contractual defences allowed by the liberal conception relate to factors which one way or another vitiate the voluntariness of agreements. Here, the defences of duress, misrepresentation, unconscionability and undue influence, are available where the entry of the offeree into the contract was due to coercion by the offeror, or to misinformation for which the offeror was responsible. In all of these cases, the defences appeal to factors which go to the voluntariness of the contract. The liberal conception allows the defences of mental disorder, infancy, and intoxication, where the effect of these states upon those raising them is that they did not voluntarily enter into the contract. The account would allow the defences of mistake and frustration, where the effect of these phenomena is to present the courts with a contract to which one or both the parties have not agreed. In all of these cases, the contractual defences can be stated in terms of voluntariness. The existence and extent of contractual obligation is to be settled by determining whether or not the parties agreed to some exchange or obligation, and not by reference to the 'fairness' of the exchange under the contract.[6]

---

[5] Michael Sandel *Liberalism and the Limits of Justice* (Cambridge University Press, Cambridge, 1982) 107

[6] For authorities for these defences and their treatment as concerned with voluntariness, see the discussion in Chapter One and accompanying footnotes.

Kronman's article is usefully approached with this sketch of the contract theory types and their relation to the notion of voluntariness in mind. His claim is, in effect, that no internalist content-independent theory of contract is plausible since the concept of voluntariness *is itself* externalist. The idea here is that a determination of voluntariness inevitably requires resort to external standards of justice in distribution. Consequently, any theory which grants a central role in determinations of the existence and extent of contractual obligation to the notion of voluntariness - which, perhaps, treats voluntariness as a criterion of such obligation - is inevitably externalist. The concept of voluntariness itself cannot be understood other than by appeal to external standards of justice in distribution, which in the contractual context function as external standards of contractual obligation.

Kronman's initial claim, then, is that the fundamental notion in the account of contract given by the liberal conception - voluntariness - cannot be understood other than by reference to some principle external to contractual processes. Note at this point that Kronman directs this claim primarily at the *libertarian* conception of contract, which he distinguishes from the liberal conception. Both oppose the use of contract law as a device for redistribution of wealth. Libertarians, however, do so because they regard *all* compulsory redistribution as theft. Liberals accept the legitimacy of distributional ends, but claim that those ends must be obtained by that one of the means available to government which interferes with individual liberty the least. According to Kronman this leads liberals to prefer redistribution through the tax system rather than through the detailed regulation of individual transactions - through the tax system, that is, rather than through regulation of contract law.[7] Kronman's project in the first half of 'Contract Law and Distributive Justice' is to collapse libertarian accounts of contract into liberal accounts. In the second half of the article he aims to show that there is in fact no principled reason for liberals to prefer redistribution through taxation rather than through contractual regulation. Given that Kronman supposes liberal accounts to accept and libertarian accounts to reject the legitimacy of determinations of contractual obligation by appeal to distributional principles, this move from libertarianism to liberalism *amounts* to a move from an internalist content-independent to an externalist content-dependent account of contract. The significance of the argument for our purposes, then is unchanged. Further, since libertarians and liberals grant priority to the notion of voluntary exchange in their accounts of contract Kronman's claims about the inadequacy of an internalist account of voluntariness appear to bite with equal force against both liberals and libertarians.[8] When I speak of the liberal conception, then, I intend to capture both liberal and libertarian theories of contract, and when I speak of the significance of Kronman's views for that conception I am drawing on Kronman's discussion of libertarian contract theories.

Kronman employs a slippery slope argument to show the inadequacy of an internalist notion of voluntariness. We are to imagine a number of hypothetical contract cases in which vendors secure agreement by a variety of means, ranging from threats of physical violence, through explicit misrepresentation, to pure nondisclosure. Kronman claims that anyone who concedes that the first of these cases amounts to involuntary exchange cannot consistently deny that status to the last. The liberal conception is likely to want to draw a line after fraud, "limiting the conditions necessary for voluntary exchange to two (absence of physical coercion and fraud)."[9] Suppose a case in which a vendor gives a selective description of real estate, intending to draw a purchaser's attention away from defects in the property, or one in which a vendor simply fails to mention defects in the property of which she knows the purchaser to be unaware. Kronman assumes that the liberal conception will not wish to regard the purchaser's entry into contracts in these last cases as involuntary in a way which would allow recission; "many will be inclined to say", he writes, "that I have only myself to blame for drawing an incorrect inference from the seller's truthful representations and for failing to take precautionary measures such as having the house inspected by an expert."[10]

---

[7] The coherence of this preference is the subject matter of part two of 'Contract Law and Distributive Justice', supra footnote 1, pp. 498-510.

[8] The point is made by WNR Lucy in his 'Contract as a Mechanism of Distributive Justice'(1989) 9 *Oxford Journal of Legal Studies* 132, 132

Here the division between voluntary and involuntary contracts is made with reference to the ability of people to protect themselves, to take reasonable precautions. But, Kronman concludes, this feature will not allow the liberal conception the division it seeks. If it were *just* a matter of withholding recission where people were able to protect themselves but failed to do so, we would have to withhold it in cases of physical coercion and fraud as well, since we *could* always protect ourselves against the former by hiring body-guards, and against the latter by requiring vendors to undergo lie-detector tests or by insisting upon explicit warranties as to the absence of defects. So, he concludes, it cannot be just that we judge people able to protect themselves from nondisclosure and unable to protect themselves against physical coercion and fraud. The idea here is that we *decide* that people have a responsibility to protect themselves against certain kinds of conduct and not others, and order our legal institutions accordingly. We simply do not provide relief in all cases where people could have protected themselves against certain kinds of conduct but failed to do so, so it is not that failure itself which distinguishes cases which satisfy the voluntariness requirement from those that do not.[11]

---

[9] 'Contract Law and Distributive Justice', supra footnote 1, 482
[10] Ibid

I suspect that it will seem to many that there is a straightforward response to this slippery slope argument. The argument relies upon it being the case that we distinguish between the possible stops on the slope on the basis of a single argument. If it were the case, for instance, that the story the liberal conception told about physical coercion were quite different from that it told about nondisclosure, we would not slide from the one to the other on the strength of Kronman's point about the inadequacy of the appeal to the ease of self-protection. At the very least each distinction would have to be collapsed separately. If the problem is not apparent given the particular slope sketched above, we can complicate that sketch by adding factors which contract law has at one time or another taken to vitiate contract, such as incapacity, mistake, or unconscionability. In each case, writes Kronman, "the promisor is asserting that his agreement, though deliberately given, lacked voluntariness because of the circumstances under which it was made...."[12] But now we need some story about why, for instance, physical coercion and mistake belong on a single continuum. Kronman justifies his treatment of these cases as being so related, by claiming that they all involve 'advantage-taking'. The idea is that if we review the various circumstances in which a party to a contract might complain that her agreement ought not to be enforced, we see that they involve some sort of advantage-taking. The advantage-taking may consist in a promisee's superior information or intelligence, in her possession of a means of violence or deception, in a monopoly of a given resource, or the like. This is a feature which unites all the possible grounds for contractual recission, and which therefore justifies the positioning of those grounds on a single continuum. In each case the question for contract theory is whether or not the proposed advantage-taking should or should not be allowed, and for the liberal conception, that is equivalent to the question whether the proposed advantage-taking is consistent with respect for individual autonomy.[13]

---

[11] Note Hugh Collins' appeal to a similar difficulty with the determination of voluntariness when he cites as a controversial case that in which a homeless family agree to a high rent to obtain shelter on a stormy night because when no alternatives are available: *The Law of Contract* (Weidenfeld and Nicholson, London, 1986) 57. Some idea of the general difficulties and options here can be obtained by comparing Collins' qualms with the analysis of voluntariness offered by Thomas Hobbes *Leviathan* (1615) especially chapter 6, and Robert Nozick *Anarchy, State, and Utopia* (Oxford; Basil Blackwell, 1968) 263. Crudely put, Hobbes supposes any *volitional act* to be voluntary, while Nozick supposes that a constraint upon choice which does not violate rights does not reduce the voluntariness of the choice.

[12] 'Contract Law and Distributive Justice', supra footnote 1, 479

At this point Kronman takes himself to have shown that the liberal conception cannot explain what it is about certain agreements which makes them and not others fail the requirement of voluntariness, without appeal beyond the notion of voluntariness itself. Voluntariness alone will not do since, no account of voluntariness alone will explain why it is present in some cases but not in others. We must appeal to some principle 'independent of voluntariness' to explain which forms of advantage-taking are compatible with the liberal conception's reverence for the moral rights of individuals to make voluntary exchanges for their own property. Kronman sums up this section of 'Contract Law and Distributive justice' so:

---

[13] Indeed, on Kronman's account the notion of advantage-taking is broad enough to capture all contractual exchanges, not just those which seem to involve impropriety: "The term 'advantage-taking'" he writes "is often used in a pejorative fashion, to refer to conduct we find morally objectionable or think the law should disallow. I mean the term to be understood in a broader sense ... as including even those methods of gain the law allows and morality accepts (or perhaps even approves). In this broad sense, there is advantage-taking in every contractual exchange. Indeed, in mutually advantageous exchanges there is advantage-taking by both parties." 'Contract Law and Distributive Justice', supra footnote 1, 480

> In attempting to sort out these various forms of advantage-taking, a number of distinctions suggest themselves - for example the distinction between physical and non-physical advantage-taking, or between those forms of advantage-taking that can be prevented by the victim and those that cannot. None, however, provides a principled basis for determining which forms of advantage-taking ought to be allowed.... An independent principle of some sort is required to determine the scope and relevance of these distinctions, and consequently it is that principle, whatever it may be, rather than the distinctions themselves that explains why we ought to allow some forms of advantage-taking but not others.[14]

So far Kronman takes himself to have shown that the liberal conception must appeal to 'an independent principle' of some sort to compliment its reliance on voluntariness in a way which will allow it to distinguish between legitimate and illegitimate advantage-taking. Now the question is 'to which independent principle should the ideal appeal?' Kronman identifies four candidates - the liberty principle, according to which advantage-taking is legitimate unless it infringes upon the rights or liberty of the 'victim', the natural-superiority principle, according to which some people are simply naturally superior to others so that advantage-taking will be legitimate where the advantage is taken by a superior of an inferior, utilitarianism which would approve of those instances of advantage-taking which resulted in 'an increase of the total of some good such as happiness', and a Rawlsian paretianism according to which the possessor of an advantage may use that advantage in contractual situations only if those not possessing it are made better off by its use than they would be were no one allowed to use the advantage. Kronman takes the liberty principle to be primary in a sense I will explain in more detail shortly. Having argued, or at least asserted, that the 'bare' version of this primary principle is meaningless in a way that we will again discuss further shortly, Kronman consider the next three principles - natural-superiority, utilitarianism, and Rawlsian paretianism - as ways of acquiring "the independent knowledge of rights necessary to give the liberty principle meaning."[15] Kronman argues that given a choice between these three, the liberal conception must select Rawlsian paretianism. The principle of natural superiority is inconsistent with liberalism's egalitarianism - the belief that all individuals are equal "in their basic right to freedom from the interference of others", while, utilitarianism violates liberalism's individualism, "the idea that individuals have moral boundaries which must be respected even if more happiness or welfare could be produced by disregarding those boundaries."[16] Rawlsian paretianism, however, like the little bear's bowl of porridge, is just right. According to Kronman the principle of paretianism rests upon the conviction that every person has an equal right not to have her welfare reduced for the sole purpose of increasing that of someone else.[17] This foundation imbues the principle with a strong respect for personal integrity, and distinguishes it from, for instance, utilitarianism, which treats the maximisation of some impersonal good as an end in itself - paretianism is not "strongly anti-individualistic". And since paretianism prohibits the use of special advantages some individuals may happen to possess, it is to be contrasted with nonegalitarian theories such as the doctrine of natural superiority. Since the liberal conception must choose one of these three supplementary principles, and since it is committed to individualism and egalitarianism, it must choose Rawlsian paretianism. The catch of course is that when incorporated into a theory of contract, Rawlsian paretianism turns out to be distributive - in order to determine the legitimacy of a given advantage-taking, we are to have reference to the general welfare. The paretian prohibition applies to all talents and assets, including wealth, strength, intelligence, and information. All will, in effect, belong to "a common pool or fund in which no one - not even the person who possesses the advantage - has a prior claim".[18] Whether I can use the advantage I happen to possess will depend not upon the result of its use for me, or - on the particular form of paretianism Kronman ultimately goes for - on the result of its use for my co-contractor. Instead it will depend upon the result of its use for 'most people' who lack the advantage, where 'most people' include those who are not parties to the contract in question.

---

[14] Ibid 483

---

[15] Ibid

[16] Ibid 485-486

[17] Ibid 488

The conclusion here, then, is that in order to give meaning to the liberty principle, the liberal conception must appeal to an external principle, and furthermore to an external principle of explicitly distributive tenor. Kronman takes himself to have shown that the liberal conception cannot give an adequate account of contract without violating its own injunction against appeal to distributive end-states. In our terms, of course this amounts to the conclusion that the liberal conception cannot maintain its *internalism*. Its commitment to the notion of voluntariness commits it to a external account of contractual obligation since voluntariness itself, the claim goes, must be understood externally. All of this could be stated, as well, in terms of the ideas of content-dependence and independence. The liberal conception supposes that voluntariness can be determined without regard to the content of contracts - what matters is *whether* people have agreed, and not what it is to which they have agreed. But once voluntariness is cashed out as a distributive notion, the content of contracts does matter. In order to determine the distributive consequences of an agreement, so as to ascertain whether or not it satisfies the externalist paretian account of voluntariness, regard must be had to what it is to which the parties have agreed. If successful, then, Kronman's argument shows that the liberal conception cannot sustain its status as internalist and content-independent. In placing the notion of voluntariness at the heart of its account of contract, it commits itself to externalism and to content-dependence.

---

[18] Ibid 493

Before moving on to consider Kronman's case, I want to draw attention to some of the ways in which this presentation of it differs from what seems to be the common reading and to suggest why this presentation should be favoured over those more common alternatives.

First, it is common to give much greater significance to Kronman's appeal to the concept of advantage-taking than I have done. It will be recalled that I suggested that the point of the appeal to this concept was to allow Kronman to unify a number of potentially distinct cases in a way which justified their positioning on a single continuum. Many will think that the contractual defences of mistake and duress, for instance, have little in common other than their status as contractual defences. Such people will find Kronman's slippery slope argument unconvincing, since it supposes that these defences can be arranged on a single continuum and collapsed together under the force of a single argument. Kronman's response, I suggested, was to argue that all of these defences are united by the fact that they involve determinations of advantage-taking. The point of the concept of advantage-taking on this sort of construal is to allow the slippery slope to run.

Compare Jules Coleman's construal of the argument as showing that once the move to advantage-taking is made "it is inevitable that courts resolve disputes on the basis of distributive concerns".[19] Here *all* the work is done by the concept of advantage-taking. The external principles are considered simply in order to answer the question 'by *which* distributive standard are the courts of determine the enforceability of contract?' But we seem unable, on Coleman's account, to make sense of the way in which Kronman introduces and presents the notion of advantage-taking. Kronman introduces that notion by remarking that the problem for the liberal conception is to determine when the circumstances under which an agreement arises deprive it of voluntariness. He continues by writing that:

> In my view, this problem is equivalent to another - the problem of determining which of the many forms of advantage-taking possible in exchange relations are compatible with the libertarian conception of individual freedom. The latter way of stating the problem may appear to raise new and distinct issues but in fact it does not.[20]

Coleman's reading seems to render this passage quite mysterious. If the move to advantage-taking *of itself* commits the libertarian to a distributive conception of contract, then it can hardly be the case that the reformulated problem is "compatible with the libertarian conception of individual freedom", or that the move does not in fact raise new and distinct issues. The passage is, by contrast, quite compatible with a reading of the argument according to which the move to a distributive conception is not effected until the libertarian is obliged to select the principle of paretianism. Here the move to talk in terms of advantage-taking is by no means trivial - since it allows the slippery slope to be generated, but the move is nonetheless, primarily a change of notation.[21]

---

[19] Jeffrie Murphy and Jules Coleman *Philosophy of Law* Revised Ed. (Westview; Boulder, San Francisco, London, 1990) 169

[20] 'Contract Law and Distributive Justice', supra footnote 1, 480

[21] This question about the role of the concept of advantage-taking may seem to raise larger concerns for our study which are not met by simply pointing out what Kronman may or may not have had in mind at this point in his argument. The issue may seem to raise the question of just what *counts* as external for the purposes of the distinction between

Second, I gave an account of the relationship between the four principles noted, which gave priority to the liberty principle. Again it is not common to do so. Most commentators suppose that the four principles noted are in direct competition for the job of supplementing the liberal conception's notion of voluntariness. They present the principles as standing, as it were, on a single level. On my account Kronman takes it that the liberal conception maintains its commitment to the liberty principle. The construal seems to be supported by the fact that Kronman's argument against this principle is not, like the appeal to individualism and egalitarianism which leads him to reject natural-superiority and utilitarianism, that the principle is inconsistent with the liberal conception, but rather that liberty principle needs supplementing with some further principle so that "we can acquire the independent knowledge of rights necessary to give the liberty principle meaning."[22] The point here is that Kronman seems to suppose that if the liberty principle could be supplemented in the appropriate fashion, then it would provide the liberal conception with the account of voluntariness it requires. Kronman considers utilitarianism and the principle of natural superiority as potential supplements not for the concept of voluntariness itself, but for the concept of voluntariness understood in terms of the liberty principle.

The suggestion that this is the proper structure of Kronman's argument is supported as well by Kronman's own statement of the options available to the liberal conception. Having argued that the liberal conception must have resort to paretianism, he remarks that the conception is left with the following choice:

---

internalism and externalism. It may seem that the appeal to the liberty principle *is itself* an appeal to an external principle. I return to this question in the next chapter.

[22] 'Contract Law and Distributive Justice', supra footnote 1, 483

> ... show that the liberty principle does in fact yield a determinative solution to the problem of specifying which forms of advantage-taking are legitimate: acknowledge the vacuousness of the liberty principle but argue that some other principle, different from the three I have considered, is the best one; or finally, accept paretianism as the appropriate standard."[23]

Note first that Kronman speaks here of *three* principles - the context makes clear that he has in mind the principle of utilitarianism, the principle of natural superiority, and the principle of Rawlsian paretianism. The liberty principle is given priority in the sense that it is that principle which is to be rescued, through being rendered determinate, by one of the three supplementary principles. Note second that Kronman supposes here that the liberal conception *would* be rescued if only we could find an account of the liberty principle which was consistent with the liberal conception (unlike those resting upon the principles of utility and natural superiority), and nondistributive (unlike the principle of Rawlsian paretianism). The idea that this strategy is available to the liberal conception *at all* only makes sense given the argumentative structure argued for in this paper. On the reading I have favoured, the damage to the liberal conception is done not by the move to talk in terms of advantage-taking, nor by the move to the liberty principle itself, but instead by the selection of a distributive supplement to the liberty principle.

If an answer to Kronman's argument against the bare liberty principle could be found, then, the liberal conception would be able to escape the distributive consequences of Kronman's argument. This is not a conclusion which is available to those interpretations which see the damage being done earlier than the selection of paretianism. If Coleman thinks the move to advantage-taking commits the liberal conception to a distributive conception of contract, a rescue effected at the stage of the appeal to the liberty principle would be too late. But Kronman does not think such a rescue too late. And likewise if we think that the appeal to the liberty principle itself commits the liberal conception to an externalist account of contractual obligation. That principle may be 'independent of the concept of voluntariness', but it does not, on Kronman's account, show the liberal conception to be internally inconsistent in the way the final appeal to paretianism does. The model advanced in this thesis may be thought to show what Kronman has in mind here. The liberty principle is independent of voluntariness, but it is not externalist and content-dependent; its independence, then, does not threaten the internalism and content-independence of the liberal conception of contract.[24]

---

[23] Ibid, 485, footnote 33

In the remainder of this paper I argue that we can rescue the liberal conception at the liberty principle stage. In doing so I take myself to be taking up the strategy Kronman identifies and endorses in the last quoted passage.[25] It is perhaps worth saying that these conclusions about the form of an appropriate response to Kronman stand regardless of the success or failure of the following attempt to provide an argument of the appropriate form. If the conclusions so far are accepted, we will have shown what an adequate response to Kronman might look like, and - especially if I am right that most commentators have failed to appreciate this - that might of itself be a worthwhile conclusion.

So what is Kronman's argument against the liberty principle, and how might it be rescued without appeal to some external criteria of justice in contract? Recall that the liberty principle states that advantage-taking is legitimate unless it infringes upon the rights or liberty of the victim. Kronman points out that the principle, so formulated, does not tell us but rather assumes that we already know what constitutes an individual's rights or liberty. For the principle to provide guidance, we must know in a given case whether an individual has the right to exploit a particular advantage, or to be free from such exploitation. Since the liberty principle taken by itself does not purport to supply the required knowledge, we must appeal to some rights-theory independent of the liberty principle to give that principle content.[26] Kronman does not turn directly to the three supplementary principles at this stage - he seems to take seriously the possibility that a rights-theory might be offered which would obviate the need for appeal to these principles. Having conceded this possibility, however, Kronman immediately claims that no such theory could in fact provide the information the liberal conception requires. He writes this:

---

[24] We will have more to say about the coherence of this sort of 'independent' internalism in the next chapter.

[25] Supra footnote 23

> Every claim concerning rights is necessarily embedded in a controversial theory: the only way to justify the claim that a person has a certain right is to argue that he has, and this means employing a contestable theory .... My argument here is that individual liberty is an 'essentially contested concept' as that term is defined by WB Gallie.[27]

I do not intend to provide anything like a full treatment of the Gallie's well known doctrine here.[28] It will do to say this: Gallie sought to explain how and why the proper application of certain terms in political theory, such as justice, freedom, and democracy, could be the subject of interminable yet not mistaken or dogmatic dispute. On Gallie's account the parties to these disputes were able to agree upon the identity of paradigm instances or exemplars of the terms in question, so had reason to believe that they were discussing the same thing - had reason to believe, that is, that the dispute was not simply the result of vagueness or ambiguity of the terms. But, since the character of these exemplars was "internally complex and variously describable", different appraisers naturally gave different weight to different features of the exemplar. The result was that they could agree upon the identity of some exemplar of the concept, but not upon what would count as other proper instantiations of the concept term.

---

[26] 'Contract Law and Distributive Justice', supra footnote 1, 485, footnote 33

[27] Ibid 483. The last line in this quote in fact appears in a footnote. Kronman refers here to W.B. Gallie's' influential article 'Essentially Contested Concepts' 56 *Proc. Aristotelian Society* 167-198

[28] The doctrine has been subject to considerable discussion and criticism. For examples of both, see John Gray 'On the Contestability of Social and Political Concepts' (1977) 5 *Political Theory* 331-348; John Gray 'Political Power, Social Theory, and Essential Contestability' in *The Nature of Political Theory* edd. David Miller and Larry Siedentop (Clarendon press; Oxford, 1983) 75-101; Christine Swanton 'On the Contestability of Political Concepts' (1985) 95 *Ethics* 811-827; Steven Lukes *Power: A Radical View* (London; Macmillan, 1974); Alasdair MacIntyre 'The Essential Contestability of Some Social Concepts' (1974) 84 *Ethics* 1-9.

Consider the concept of democracy. We might be able to agree upon some historical exemplar of the concept. Perhaps we will think that the decision making process in quaker communities is paradigmatically democratic. But there are likely to be numerous features to such a practice - perhaps everyone over a certain age has a vote, perhaps all votes have equal weight, perhaps everyone over a certain age may stand for election to 'political office', perhaps every important issue is decided by public referendum. Given the constitution of the practice by these various features, particular kinds of disagreements are likely to arise among those who agree upon the status of such a practice as paradigmatically democratic. They might disagree about what should be on a list of important features. Someone might think democracy is 'really about' electing decision-making officials. The practice of holding referenda may seem irrelevant to the status of a practice as paradigmatically democratic. They might disagree upon the ranking of features they grant to be important to exemplar status. They may agree upon the status of the quaker example as paradigmatic, but disagree upon the relative importance of its various features to that status. One appraiser might think what really matters is the resort to referenda, another the degree of suffrage, another the right of all to stand for election. Given *these* sorts of disagreements, they are likely to disagree upon the proper application of the concept term - they are likely to disagree, that is, on what counts as a *conception* of the concept. They will disagree over which practices, other than the exemplar, are democratic. Such an analysis, according to Gallie, amounts to claiming that 'democracy' is an essentially contested concept.

Kronman places tremendous weight upon Gallie's doctrine. Indeed, it is the *only* argument he offers against the liberty principle. He dismisses that principle because it is vacuous: it "provides no guidance in deciding which forms of advantage-taking ought to be allowed."[29] The vacuity of the liberty principle flows from the fact that it requires supplementing with a rights theory if it is to provide the sort of answers the liberal conception requires. But all rights theories are undercut, according to Kronman, by Gallie's essentially contested concepts doctrine. Given the weight Kronman places on Gallie's doctrine, it will be clear that an argument to the effect that that doctrine did not have the damning effect Kronman supposes, would have serious consequences for Kronman's argument as a whole. The damage here will be all the greater, of course, if the earlier arguments of this paper, which were concerned to show the centrality of the argument against the liberty principle to Kronman's case, are accepted.

My claim is that Kronman misunderstands the significance of Gallie's doctrine. Properly understood, that doctrine does not support Kronman's position, and indeed is suggestive for a rescue of the liberty principle. The point here is this. Kronman suggests that the essential contestability of rights or liberty prevents the liberal conception from relying upon those concepts in a theory which would give content to the liberty principle. But this is, I think, simply to misunderstand the point of Gallie's doctrine. Gallie's doctrine does not show essentially contested terms to be *unusable* in political, or legal, discourse. Indeed it is in large part the continued desire to defend particular uses or applications of these terms which drives the doctrine. It is notable that Gallie raises the concern not that contested concepts will drop out of political discourse, but that powerful advocates of certain applications would be prompted to use force to impose the applications they favoured once they recognised that the very nature of the concepts meant that they would never secure agreement.[30] The point here is not simply one about the proper interpretation of Gallie's doctrine. There is, for a start, a more general point about the failure of disagreement over the extension of terms to render such terms useless in human discourse - Kojak's bald and I'm not and we could enter into a contract which turned upon this fact, sorites paradox notwithstanding. Beyond this, it seems plausible that the truth of some doctrine such as Gallie's, may *prompt* certain kinds of rights theories, rather than ruling them out as Kronman assumes.

---

[29] 'Contract Law and Distributive Justice', supra footnote 1, 484

Consider why one might favour procedural over substantive approaches to normative concerns. I take it that one plausible explanation, which seems consistent with the liberal conception, might go something like this: We live in a world where decisions which affect more than one person must be made and acted upon. It is simply true that there is not unanimity as to the nature or even identity of the substantive concerns which should motivate or direct those decisions - there just is not unanimity as to what 'justice' is or what it requires in particular cases or what decision would serve its point in given cases. The same point can be put, of course, in terms of uncertainty as to the identity or requirements of external or independently specified standards of fairness. If we need to be able to convince others of the status of candidate laws or contracts, and if that status is to be determined by reference to substantive properties, then we need to be able secure agreement on what counts as promoting the point of the concept and on which candidates do in fact promote that point. We must be able to classify cases by reference to their relation to the relevant substantive goals, or ends, or points. The presence of widespread disagreement over such substantive properties threatens the value of an account of normative concepts which relies upon such properties. Given this we have reason, according to this story, to adopt procedural or institutional decision making systems which see to it that decisions are made and made in ways which will satisfy even those whose views as to the substantive concerns have not been acted upon. General agreement that some such substantive interest is at stake may be sufficient to motivate parties to co-operate in establishing systems to come up with, perhaps in their view necessarily imperfect, procedural protection for such interests. Here recognition that we are unable to agree on the precise extension or consequences of given concerns, which concerns we take to be shared by by our fellows, may be a *reason* to adopt procedural decision making systems.

---

[30] Gallie, supra footnote 27, 193-194: "So long as contestant users of any essentially contested concept believe, however deludedly, that their own use of it is the only one that can command honest and informed approval, they are likely to persist in the hope that they will ultimately persuade and convince all their opponents by logical means. But once let the truth out of the bag - i.e. the essential contestedness of the concept in question - then the harmless if deluded hope may well be replaced by a ruthless decision to cut the cackle, to damn the heretics and to exterminate the unwanted."

What I want from Gallie is the idea that we have sufficient commonality or consensus over our concepts such as justice, or contract, and so on, to lead us to structure our communities in ways which respect and foster those concepts, but sufficient discord and dissent over those same concepts, at the level of conceptions, to prevent direct appeal to them in decision making. Gallie's account seems suggestive, since it contains features which are analogous to substantive concerns (concepts) and to procedural or institutional concerns (conceptions). But that account does not militate toward substantive normative systems. Gallie's recommendation is not that the parties to disputes over essentially contested concepts should give up the search for conceptions, and make do with the exemplars over which they agree. The exemplars themselves do not serve the needs which drive the protagonists to search for adequate conceptions. The agreement at the level of concept or function is not enough to allow unmediated appeal to the point of concepts in deciding upon the propriety of proposed conceptions. That is what generates dispute. Where decisions are required *despite* such intractable dispute, we seem to have reason to look to institutional or procedural decision making systems in the hope that even those whose views on the substantive issues have not been acted upon will feel that they have been taken seriously and treated with respect.

My suggestion, then, is that the lesson to draw from the recognition of the intractability of discussion as to the proper extension of normative terms - recognition of the phenomena which prompted Gallie's essentially contested concepts doctrine - is not that we must abandon rights-talk, and have resort directly to substantive concerns as Kronman seems to suppose. Rather, it is that certain conventional, or institutional, or procedural rights-theories should be seen as particularly plausible solutions to the normative dilemmas such intractability is likely to generate.

On this account, rights-theory functions as a kind of *modus vivendi* - as a way of securing community and cooperation, of getting by in the face of intractable disagreement over the substantive moral and political concerns which might be required to give a full account of the ends of such community and cooperation. Advantage-taking will be legitimate provided that it does not violate those rights held by individuals by virtue of the conventions of their community. Such rights may well be 'imbedded in a controversial theory', if by this we mean theories as to substantive goods. But such controversy will explain and justify rather than disqualify the resulting rights-theories.

My suggestion, then, is that Kronman's criticism of the liberty principle is, at least, deeply flawed. At the crucial point, Kronman simply appeals without more to Gallie's doctrine of essential contestability. But such an appeal is completely unconvincing. It is, of course, not an argument at all (and saying "My argument here is ...." does not make it so), and in any case Gallie's doctrine does not support Kronman's position, since, *pace* Kronman, it does not show essentially contested concepts to be unusable in normative discourse. Indeed, properly understood, that doctrine lends itself more readily toward the approaches to normative inquiry that Kronman rejects than it does toward those he supports.

Chapter Five

The Relation Between Substantive and Procedural Approaches

In the previous chapter, I examined Anthony Kronman's influential argument for the claim that contract law was necessarily distributive, and so, in the terminology of this study, necessarily externalist and content-dependent. I argued that many commentators had misunderstood the structure of Kronman's argument in a way which had prevented them from appreciating the form of an adequate response to Kronman. Kronman's case against internalist content-independent conceptions of contract depends upon his rejection of what he calls the 'liberty principle', roughly the idea that advantage-taking in contract is legitimate provided that it does not involve any rights-violation. Kronman does not provide an independent argument for the rejection of this principle. Instead, he presents W.G. Gallie's well known thesis that certain concepts are essentially contested. Kronman takes this thesis to show that rights theories are vacuous, and so unable to provide the distinction between legitimate and illegitimate advantage-taking required by internalist content-independent conceptions of contract. In fact, however, I argued, far from supporting Kronman's rejection of the liberty principle, Gallie's doctrine provides the grounds for just the approach to normative inquiry which that principle seems to recommend. We might favour an approach to normative inquiry such as that offered by the liberty principle, precisely because our agreement over the proper scope of normative terms, while real and significant, is nonetheless too general to allow direct appeal to normative concepts in deciding the propriety of particular applications or conceptions of concept terms. To put the point bluntly, Gallie's doctrine is, I believe, consistent with the intuitions of the liberal conception in a way which ill-suits it to service in support of Kronman's case.

In this chapter I want to draw some wider conclusions from the discussion of Kronman's argument. That argument rests upon a certain picture of the structure and function of normative systems, and in particular upon a certain picture of the *relation* between substantive and procedural approaches within such systems. Kronman assumes that if it can be shown that a full account of the structure and practice of any of the institutions of our legal system requires appeal to substantive concerns, then those institutions will thereby be shown to *be* substantive rather than procedural or conventional systems. It seems to me that this assumption is mistaken. If I am right about this, we will have both a further line of criticism of Kronman's argument, and a conclusion of broader significance as well.

One sort of criticism of the liberal conception claims that it is unable to take seriously the sorts of substantive concerns which seem to underlie community and cooperation. The intuition here is that the liberal conception cannot be right since law is important because of its bearing upon or relation to certain substantive concerns which the liberal conception does not protect and foster. Kronman's assumption that any account of our legal system or its institutions which grants a role to substantive concerns *is* substantive, is the flip side of this complaint: proceduralism is criticised as failing to take certain important substantive concerns seriously, and if it *does* take those concerns seriously, then it is said *not to be* procedural at all.

Proceduralism is accused here, then, of facing a certain kind of dilemma. The idea is that proceduralists can either allow or deny that their institutions or practices can effectively confer normative status regardless of the existence or quality of the substantive reasons for such conferral.

Suppose first that proceduralists deny that their conferrers require reasons in order to effectively confer normative status. All that is required is the fulfilment of the procedures. Possession of normative status is, potentially at least, very important - especially in the political or legal sphere. It may matter a great deal whether or not a particular relationship counts as contractual or not. But this importance seems to be threatened by the claim that procedural conferral of normative status can be effective regardless of the existence of quality of reasons for such conferral - it seems to be threatened by the idea that such status can be given for no reason whatsoever, or for any reason whatsoever. One common expression of this horn of the dilemma refers to the idea that without a requirement for reasons for acts of conferral all procedures are equally satisfactory. But, the claim goes, this idea is mistaken. The procedures of racist or totalitarian societies are not as good as those of societies which lack these vices. This judgement relies upon appeal to external considerations of justice or fairness.[1] This expression of the first horn of the dilemma, then, appeals to the idea that some procedures must be better than others, and that to rank them we require reference to reasons beyond the conventions or procedures themselves. Generally, impalement on the first horn of the dilemma amounts to the denial of the normative significance of the concepts in question.

---

[1] Randy Barnett illustrates the horn when he rejects what we have called pure proceduralism because such theories cannot explain why certain *kinds* of contracts, such as those for slavery and murder, are not and should not be enforceable; "[i]f ... agreements of these types are reached in conformity with all the 'rules of the game,' a theory which looks only to the rules of the game to decide issues of enforceability cannot say why such an otherwise 'proper' agreement should be unenforceable." 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 289-290

Suppose, then, that proceduralists allow that conferrers must have reasons for their acts of conferral. Procedural conferral of normative status here will only be effective if those who confer such status can show that there are reasons, and perhaps good reasons, for a particular conferral. Procedural conferral is required, on this account, to be justified or justifiable on substantive grounds. The force of this horn of the dilemma will be obvious. If procedural conferral is effective only given the existence of reasons, or substantive considerations, then it seems that it is those substantive considerations which determine normative status after all. The proceduralist's conferral is merely a *confirmation* that the subject enjoyed the relevant normative status independently of and prior to the alleged conferral. Something other than the conferral gave the subject its normative status, and that something other is properly understood in substantive terms. Again this can be put in terms of the judgement that some procedures will be better than others. If the proceduralist acknowledges this, the substantive theorist claims, they show that it is the reasons for preferring one set of procedures over another that indicates the nature of the concept and not the procedures themselves. If we judge the judicial procedures of a racist country to be worse than those of a country which is not racist, and so to be incapable of conferring normative status, because we judge racism to be bad, then we seem to say that it is this substantive judgement about racism and the substantive assessment of the point of judicial procedures which is important, and not the judicial procedures themselves. Impalement on the second horn of the dilemma amounts to a concession that the content and extension of the relevant normative concepts is not determined procedurally after all.[2]

The overall force of the dilemma lies in the claim that procedural approaches are unsustainable, since they must either deny the importance of normative status, or embrace substantivism. The connection between the dilemma and our earlier discussion will, I hope, be clear. The proceduralist is led onto the dilemma by conceding or denying that the procedures which confer normative status succeed in doing so only where such conferral is motivated by the appropriate set of reasons. Procedural definitions are only effective, that is, where the particular application promotes the point of the concept so defined. By the same token, the substantivist argues that effective conferral of normative status requires reference to (substantive) considerations beyond the mere procedures themselves. If normative status is in fact determined by reference to substantive concerns, even where a procedural conferral has occurred, we may say that we must look *through* the procedures to an independently specified standard or criteria of such status that obtains prior to and independently of the procedures.

Here is an example of this dilemma. In order to see the inadequacy of the 'procedural conception of law', Rodger Beehler claims:

> One has only to ask whether ... any process will do. The answer, surely, is no. The basic tenet of the procedural conception (as of the substantive conception) is that the rule of law is the opposite of arbitrary rule.[3]

And he continues, though the procedural conception construes 'arbitrary' narrowly, so that its avoidance consists merely of the provision of procedural protections - such as the need for public promulgation of laws and the opportunity for accused persons to put a defence - still;

---

[2] Richard Wollheim runs this dilemma against Dickie's institutional theory of art in his *Art and Its Objects* 2nd Ed. (Cambridge University Press; Cambridge, 1980) 157-166

[3] 'Waiting for the Rule of law' (1988) 38 *University of Toronto Law Review* 298-316 at 299

> ... this emphasis is itself quite sufficient to introduce a substantive moral content to the (allegedly) neutral procedural conception, since it entails denying the description 'rule of law' to processes which do not preclude arbitrary rule ... [4]

Beehler's point against the proceduralist relies upon the dilemma sketched above; proceduralists cannot say that just any procedure will do, but if they do not then they are shown to be substantive theorists *malgre leux* And this can be thought to be Kronman's general point as well. On Kronman's account, the libertarian contract theory claims to rely solely on procedure. But that procedure must be fulfilled voluntarily. So not just any procedure will do. The libertarian must favour those procedures which preserve voluntariness. But now they are shown to be substantive theorists after all. Since the concept of voluntariness must be given content by reference to a substantive moral theory, the dilemma shows them to be substantive and not procedural theorists.

In the previous chapter I presented a defence of the liberty principle which relied upon the idea that we might conceive of a rights-theories as mere *modus vivendi*. Such a conception does not reject all appeal to substantive concerns. It is the fact that individuals agree over at least broad specifications of concepts, such as justice and fairness, in substantive terms, while disagreeing over just how those specifications can be made more precise, or how they can be applied in practice, which leads them to cooperate in establishing dispute resolution procedures. Given that it grants such a place to substantive concerns, this account may seem to fall to the dilemma presented. In allowing that the members of communities are motivated to develop procedural systems by their shared perception that some significant substantive concern is at issue, the defense of the liberty principle mounted in the previous chapter may seem to fall to the dilemma I have associated with Kronman and Beehler. The procedural account offered may seem unable to do justice to the normative concepts it purports to determine, or to be substantive after all.

---

[4] Ibid 300

The implicit objection to substantive theories which lay behind the account we sought to tease out of Gallie was the idea that whatever we think of the existence of substantive criteria of (e.g.) justice, we have little reason to believe - given our deep disagreements over the identity and requirements of those criteria - that they will be able to function in helpful ways in normative discourse. The account appeals to the fact of pluralism, and claims that this fact militates toward proceduralism or conventionalism. But the account concedes the proceduralist's inability to *completely* deny a role to substantive concerns. What I wanted from Gallie was the idea that we have sufficient commonality or consensus over our concepts such as justice, or contract, and so on, to lead us to structure our communities in ways which respect and foster those concepts, but sufficient discord and dissent over those same concepts, particularly at the level of conceptions, to prevent direct appeal to them in decision making. Gallie's account seemed suggestive, since it holds aspects analogous to both substantive concerns (concepts) and procedural or institutional concerns (conceptions). The dilemma claimed, however, that to concede a place for substantive concerns was to embrace substantivism. How might we avoid the dilemma?

We might usefully begin with an example designed to show how the proceduralist at least supposes that she can do so. Consider the concept of property. It seems plausible that the concept of property derives its point from the fact people have in common basic needs for certain goods and, given the relative scarcity of those goods, a further need for security of access to them. Let us suppose that some set of procedures was established or evolved to meet these needs. Of course a number of different procedures might have (and have) been adopted, all of which would be adequate to the task. The procedures actually adopted in a given community determine who owns what in that community. In unforeseen ways, the continued application of those procedures might (and notoriously does) result in social conditions which prevent some members of that community from satisfying the basic needs which, *ex hypothesis*, prompted the adoption of the procedure at the outset. That is to say, the rules of the institution of property might (and notoriously do) apply overtime in such a way as to defeat the very point of the concept of property. The difference between procedural and substantive approaches is revealed the different significance each gives to this fact. According to the proceduralist, even where this sort of 'self defeating' situation arises, until the procedure is changed, those who 'own' property pursuant to the procedure really do own it. The notion of property is taken to be *defined* in these circumstances by the procedure, and not by the point of the procedure, notwithstanding that the procedure was adopted *ab initio* in recognition of that point. To own something in our hypothetical community (and indeed in our actual community) *means* to have title to it according to the institution of property.

Now this sort of account may seem rather harsh, or indeed libertarian. The proceduralist might seem to render it a little more palatable by the following concessions. Obviously the example is oversimplified. It claims that the concept of property has a single point. It may have several. Its point may alter through time. Its point may be different from that I have identified.

If the point of the concept of property were, for instance, to secure an on-going substantively fair distribution of goods among the members of a community, proceduralists may concede that it would generate a different set of procedures and so a different concept of property. For now I wish to merely acknowledge the possibility of such objections, and claim only that the suggested point is sufficiently plausible to make the current point.

Now clearly some will wish to claim that given the scenario sketched, the procedures of the institution of property (and given the claim that those procedures determine what property means, the concept of property itself) should be changed, and that such changes should look to the point of the concept for their justification. All of this proceduralists typically accept. What they reject is any suggestion that, prior to changes in the procedures, those who hold property according to the procedures do not 'really' own it at all. That is, while proceduralists acknowledge that the procedural rules which define the concept of ownership are *ultimately* answerable to the point of the concept, nevertheless they deny that this shows that the concept of property is, in fact, to be defined in terms of the concept's point. The appropriate procedures for a community to adopt are those which promote the point of the concept, and, where the continued application of the procedure ceases to do so, this fact militates toward a change in the procedures. But, in the interim, the claim goes, it is the procedures which define the concept of property.

So, at least, do proceduralists suppose themselves able to avoid the dilemma. The claim here is that proceduralists can acknowledge the significance of substantive concerns in the selection and development of procedures, but deny that those concerns determine the meaning of the concepts defined by those procedures. This is to deny the force of the dilemma. If this initial response could be sustained, it would not be the case that in granting a role to substantive concerns, proceduralists *become* substantivists.

Can this initial response be sustained? In the previous chapter, I was concerned to question the attack launched by substantivism upon procedural theories and the plausibility of substantive theories: substantive theories do not tell us how to go on, and *that* is what matters in normative inquiry. The presence of intractable disagreement over the nature and content of concepts such as justice or fairness of just the sort Gallie's analysis hints at, prevents us from determining legal issues or their moral counterparts by direct appeal to such concepts. We can go further in supporting the proceduralist's claim that substantive and procedural concerns *can* be split to avoid the dilemma, by noting how commonly and naturally we *do* distinguish between the existence of even good reasons for granting something a certain status and thinking that thing *has* that status. Good reasons for marrying or divorcing are not good reasons for thinking we are married or divorced. Good reasons for thinking someone should be employed are not good reasons for thinking them employed. These are examples of a common distinction between the *reasons* for thinking some thing has a certain normative status, and thinking that that thing *has* that normative status. Here the normative status is bestowed procedurally, and such bestowal is, on the one hand, sufficient even in the absence of the appropriate reasons, and on the other hand, necessary even given the presence of such reasons.

We would, of course, not have the procedures we do have for bestowing these normative statuses, were it not the fact that we thought they reflected or fostered the sorts of reasons we take to be good reasons for granting a thing the statuses in question. If we think good reasons for granting someone the normative status 'divorced' include the fact that their marriage relationship has irreconcilably broken down, we have reason to develop a set of procedures which relies upon and gives weight to such a breakdown. But still someone whose marriage relationship has irreconcilably broken down, is *not* divorced. They will have that status only when the procedures which define 'divorced' have been exercised in their regard. The procedural nature of a normative status such as 'employed' or 'divorced', then, is not threatened by the concession that we would not have the procedures we have for employing or divorcing people were it not the case that we believed those procedures reflected the kinds of reasons we think are good reasons for doing so.

The distinction which lies behind our ready recognition of a difference between the existence of good reasons for the bestowal of the status 'divorced' and the possession of that status, is just that between substantive and procedural concerns. Our intuitions about such cases show us how it can be the case that a procedural account of concepts such as divorced, employed, contract, and so on, looks both to substantive and procedural concerns but nonetheless remains procedural. This is to say that the proceduralist need not fear the second horn of the substantivist's dilemma. Proceduralists can concede that their procedures are motivated by substantive concerns, but maintain their conviction that normative status is determined not substantively but procedurally. The point of all of this is to suggest that proceduralists need not renounce their position merely because that position is motivated by substantive concerns. The two positions are not related in the way Kronman and Beehler assume. All plausible proceduralists, I take it, acknowledge their position to be in some sense ultimately answerable to substantive aims.[5] The dilemma may seem to show such a concession to be inevitable - without a grounding in substantive concerns, proceduralism does seem arbitrary. But if the relation between substantive and procedural approaches is as this chapter has suggested, the proceduralist can avoid this arbitrariness without abandoning proceduralism. The proceduralist need not deny all role to substantive concerns. What they reject is the claim that this shows them to be substantivists. The disagreement is over the function of substantive criticism and the role substantive concerns are able to play in decision making and justification.[6] And if this is correct, it will not harm the proceduralist to concede that the concept of voluntariness, cashed out now in terms of a procedural or conventional rights theory, cannot be fully understood without reference to substantive concerns.

It will perhaps be useful to apply these remarks to an exchange in contract theory. In presenting the two contract theory types which have provided a framework for much of the discussion in this study, I have occasionally called upon an account of two alternative views of justice in contract provided by Michael Sandel. Sandel points out that we may assess the justice of a contract or agreement from two points of view; "[w]e may ask about the conditions under which the agreement was made, whether the parties were free or coerced, or we may ask about the terms of the agreement, whether each party received a fair share."[7] These two approaches are, of course, analogous to our internalist content-independent and externalist content-dependent theory types respectively. Sandel characterises the former as flowing from the *ideal of autonomy,* in recognition of the fact that it derives from the liberal respect for the autonomy of individuals, and the latter as flowing from the *ideal of reciprocity.* For our purposes, then, we can take it that the ideal of autonomy gives a procedural account of justice in contract. The question 'is that contract just?' will be settled for the purposes of this ideal by determining whether the contract has been entered into in ways which respect the autonomy of the parties; by settling, for instance whether or not there has been fraud, duress, misrepresentation or like. But, Sandel maintains, even after the justice of a contract has been established from the perspective of autonomy, we can still properly ask 'but is it fair?': "Of any contractual agreement, however free, it is always intelligible and often reasonable to ask the further question, 'But is it *fair*, what they have agreed to?'"[8] On Sandel's account, this extra question calls for an answer from the perspective of an external standard of justice, hence "[w]here autonomy points to the contract itself as the source of obligation, reciprocity points *through* the contract to an antecedent moral requirement to abide by fair arrangements, and thus implies an independent moral principle by which the fairness of an exchange might be assessed."[9]

---

[5] See e.g. HLA Hart's *The Concept of Law* (Oxford; Oxford University Press, 1961), especially chapter 9.

[6] As the previous footnote suggests, much of what is said here connects with more general jurisprudential debates, and in particular with the perennial dispute between positivism and natural law theory. Positivists are proceduralists, but few deny that substantive (moral) concerns have at least evaluative force. What they do deny is that such concerns are relevant to the status of procedurally derived laws *as* laws.

[7] Michael Sandel *Liberalism and the Limits of Justice* (Cambridge; Cambridge University Press, 1982) 106

I have little quarrel with Sandel's characterisation of the different approaches to the justice of contract. His model is, for the most part, consistent with the analysis offered in this paper.[10] It might seem that such an account leaves with Sandel with three options: he might endorse the perspective of autonomy, the perspective of reciprocity, or a mixed perspective of some kind. According to Peter Benson, Sandel does the latter.[11] Benson maintains that Sandel is offering the 'questions considerations' noted above - the fact that it is 'always possible and often reasonable' to ask of a contract shown to be just from the perspective of autonomy whether it is also just from the perspective of reciprocity - as an indication of the necessary nature of a positive theory of the morality of contract. Sandel, on Benson's account, in drawing attention to the possibility of this 'extra question', is arguing that an adequate theory must incorporate the views from *both* perspectives, so that an agreement or contract must satisfy both ideals of justice in contract if it is to count as just. Sandel's claim, Benson writes, is:

---

[8] Ibid

[9] Ibid 107

[10] If anything, Sandel gives an account of the competing ideals which make the distinction between them seem somewhat straightforward. I hope the treatment offered in this study will show that distinguishing the two, or keeping them apart in normative discourse, is unlikely to be as simple as Sandel's "can we ask another question" test suggests.

> ... not that autonomy and reciprocity constitute two mutually independent and individually complete standpoints from which to assess the justice of agreements .... Rather, Sandel's point is that a justification which is framed in terms of only one of the ideals must be partial and inadequate. ... And, since the justificatory function of both ideals relates to the same thing, namely, to the existence of a contractual obligation, it must be possible to conceive the two ideals as united in one conception of the justice of agreements. In support of this claim, Sandel appeals to the supposed self-evidence of the following proposition: of any agreement, however uncoerced, it is always possible to ask the *further* question "[b]ut is it *fair*, what they have agreed to?" .... The incompleteness of each, Sandel concludes, necessitates the inclusion of both in the moral justification of contract.[12]

I hope the account of the relationship between substantive and procedural approaches to normative theory offered in this chapter will suggest why the mere fact we can always and often reasonably ask Sandel's extra question is a poor argument for the necessity of a mixed theory.

---

[11] Peter Benson 'Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory' (1980) 10 *Cardozo Law Review* 1079, 1092-1095 and 1117-1118

[12] Ibid 1094

Suppose, in answer to our question 'Are Miles and Maria married?' we are shown a marriage certificate or some such other proof that they have been through an authorised marriage ceremony or procedure. We could, of course, always go on to ask 'But *should* they be married?' An answer to this extra question might be expected to appeal to substantive considerations about love, commitment, fidelity, and so on - to the sorts of considerations we think constitute the point of marriage. This question about whether Miles and Maria *should* be married would be analogous to Sandel's 'extra question' about the substantive justice of a contract or agreement. And we could do all of this in reverse: "Should they be married?" "Yes, they love one and other dearly." "Well, are they married?" Here we have two questions, analogous to Sandel's questions about contract, and we could produce such dialogues for any 'procedural' notion, such as divorced, employed, enrolled, or the like.

What does the fact that we can 'always and often reasonably' ask both sorts of questions tell us about the nature of these concepts, or about the form of an adequate theory of such concepts? Not, I take our earlier considerations to have shown, that an adequate answer to a question about an instance of them requires appeal to both procedural and substantive consideration, or to the perspectives of both autonomy and reciprocity. Marital status can be fully determined, if one is a proceduralist about this, by reference to the relevant procedures. Of course, which-ever question we begin with, we can go on to ask the other, and a treatise on marriage might be expected to address both, but the fundamental question about normative status does not turn upon the answer to the extra, substantive, question. Good reasons for thinking someone should be married are not good reasons for thinking they are married, good reasons for thinking someone should get divorced or employed, are not good reasons for thinking them divorced or employed.

The mere fact that we can ask both questions, then, does not militate toward a mixed theory at all. If Sandel meant to argue for such an approach by appeal to the fact that one *could* ask both questions regardless of the answer to either one of them, he would have offered a poor argument. We only to need to rehearse the considerations offered in this chapter, and consult our common practice with regard to institutional or procedural concepts such as 'married', 'divorced', 'employed', and so on, to see that the mere fact both types of inquiry are available to us does not settle the normative status of such concepts.

So what is Sandel up to in the section Benson addresses? My suggestion is that, first, Sandel means to argue that a full account of morality in contract requires reference to both perspectives, where by 'a full account' we mean an account which would allow us to comprehend the position of any of the protagonists to the debate. If we want to understand all that might be said about justice in contract, we need to understand the possibility of positions motivated by each of Sandel's two opposed perspectives, as one needs to understand the possibility and claims of theories of each of our two contract theory-types. But this is not to say, as Benson seems to suggest, that in order to give an account of the normative status of any particular contract regard must be had to both perspectives, in a mixed account which determines normative status from both perspectives in a single moment.

This interpretation of Sandel's project is especially significant in the context of the exchange between Sandel and Benson, since Benson thinks that Sandel's position involves a contradiction: "The feature", he writes, "that distinguishes autonomy is the opposite of the one that defines reciprocity. How, then, can there be an intelligible conception of the basis of contractual obligation in which the two ideals are held together as integrated parts of a whole?"[13] According to Benson, Sandel requires and cannot have "a plausible explanation of the necessity and unity of autonomy and reciprocity."[14] Sandel avoids this charge, I propose, since he does not suggest that a final account of the justice of a particular contract does have to be a 'unity' of the two perspectives. The two perspectives must feature, as it were, in the match report and not in the identity of the victor. And given *this* role, they do not generate Benson's contradiction.

Sandel, then, does not endorse a mixed view, at least not in the somewhat naive sense Benson seems to attribute to him. Sandel's account is mixed in the sense that he believes that a full treatment of justice in contract requires reference to both the ideal of autonomy and the ideal of reciprocity. As for the ultimate determination of normative status, Sandel argues on other grounds for the implausibility of the ideal of autonomy. Indeed the central thesis of *Liberalism and the Limits of Justice* is that the liberal conception, which, on both Sandel's account and that offered in this study, lies behind the ideal of autonomy, is deeply flawed. We will not examine these other grounds in depth at this point. It will suffice to say that at the heart of Sandel's critique is the claim that liberalism rests upon an idea of the self as standing prior to and independent of its ends and projects, its 'worldly' possessions and properties. On Sandel's account, liberalism requires such a self since only such an entity could attain the neutrality between ways of being in the world from which the liberal conception proceeds.[15] In fact, however, Sandel and other communitarians argue, the liberal self could not make the choices between ways of being which allow liberalism to derive, for instance, the liberal state. Since liberalism's self is radically disembodied and alienated from the world, it has no criteria of choice. Hence its choices and decisions are arbitrary and meaningless. Hence liberalism is deeply flawed. Hence the ideal of autonomy is deeply flawed.

---

[13] Ibid

[14] Ibid 1095

[15] See Chapter One above

Now we do not get this general complaint against liberalism in the section of *Liberalism and the Limits of Justice* which concerns itself with contract law in particular. But the argument there is consistent with the overall project of Sandel's book. In that section Sandel seems to suppose that the 'questions argument' is primarily an argument, not in favour of a mixed account, as Benson suggests, but against the ideal of autonomy. Sandel concludes this section with an appeal to a distinction Rawls draws between *pure* procedural justice on the one hand and *perfect* and *imperfect* procedural justice on the other.[16] In pure procedural justice, "there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed."[17] Perfect and imperfect procedural justice obtains, on the other hand, when "there is an independent standard for deciding which outcome is just".[18] Procedural justice will be perfect where we can devise a procedure which is guaranteed to lead to the outcome identified by the independent standard, and imperfect when we cannot devise such a procedure. According to Sandel, "[a]ctual contracts are typically cases of imperfect procedural justice; pure procedural justice rarely, if ever, appears in the world."[19] Again, I hope the discussion in this and the previous chapter will indicate the form of an appropriate response to both Sandel and Rawls here. Sandel does seem to suppose that the 'questions argument' shows the impossibility of pure procedural justice: in asking the further question of a contract shown to be just from the ideal of autonomy, the idea seems to be, we show that there is indeed an independent or externalist standard by which we ultimately determine the justice of agreements. If this determination does involve such an externalist appeal, we are in the realm of perfect and imperfect procedural justice. But I hope the preceding discussion provides us with a response. The claim there was that the status of normative concepts, or, more accurately, of normative conceptions, is dictated not by *whether or not* the extra question makes sense, but by whether or not the application conditions for the concept term are internalist or externalist. This move in Sandel's argument is analogous to that made by Rodger Beehler. The mistake is to suppose that if substantive concerns have *any role at all* in normative discourse, then the concepts which are the subject of that discourse are shown to *be* substantive. Again, as the examples given above show, the fact that the full elucidation of a normative concept, where a 'full elucidation' is one which provides a framework in terms of which any possible position within discourse about that concept might be comprehended, will need to take account of externalist or substantive concerns does not show those concepts to be externalist or substantive. The application conditions for concepts such as 'married', 'employed', 'divorced', and so on, are procedural, notwithstanding that we can always ask the substantive question.

---

[16] Michael Sandel *Liberalism and the Limits of Justice* (Cambridge; Cambridge University Press, 1982) 108-109. See John Rawls *A Theory of Justice* (Oxford; Oxford University Press, 1973) 85.

[17] John Rawls *A Theory of Justice* (Oxford; Oxford University Press, 1973) 86.

[18] Ibid

[19] Michael Sandel *Liberalism and the Limits of Justice* (Cambridge; Cambridge University Press, 1982) 109

I do not take any of this to rule out the possibility, or indeed the necessity of a mixed account in the wider sense of that notion, where a mixed account is one seeks to comprehend all possible positions in a particular piece of normative discourse. Indeed the account of the individuation of normative concepts offered in this study is one which does grant a role to both perspectives, to both internalist and externalist considerations. We would not have the procedures we do for determining the application of procedural normative concepts were it not the case that we supposed those procedures to connect with our substantive concerns. But this, the account suggests, is not to say that such concepts *are* substantive, or externalist. Sandel may be right about the rarity of pure procedural justice as that notion is defined by Rawls. He is mistaken, however, in supposing that that fact shows that normative concepts are always or almost always externalist.

One way to put this point is to say that the fight between proceduralism and substantivism, between internalism and externalism is over a small piece of high ground - substantivism with no way to make decisions given deep disagreement over the application conditions of crucial terms (such as fair, just, contract) will not be able to tell us how to go on, and that is what matters in normative theory. Gallie is right. Such terms are 'essentially contested'. We just don't agree as to what justice is, or what it requires in given cases - we need some procedure that will secure our allegiance even where we think it does not act as we would have it, had it been up to us alone. As the dilemma set out above shows as well, however, proceduralism on its own though is equally implausible. It gives no guidance on the form of appropriate procedures. *That* will be done by substantive considerations. Each perspective needs some of the resources of the other. This, however, will not get us stuck in Benson's contradiction, or the collapse to substantivism argued for by Kronman, Beehler, and Sandel, so long as we ultimately rely upon one or the other of the two possible perspectives. I have tried to give examples of terms the application conditions for which are procedural or internalist -where, to put the matter in Sandel's terms, we rely upon the perspective of autonomy. Justice, fairness, contract, enforceable, are in the same category. We would not have the procedures we do have for bestowing contractual status on an agreement, were it not for the fact that we believed that those procedures furthered some substantive goal, but still that status just *is* bestowed procedurally.

Before closing this chapter, it will be worth making clear just what I take it and the preceding chapter to have established. It seems to me that these chapters have established both *positive* and *negative* theses. The positive thesis is one in favour of internalist content-independent theory types. *Pace* Kronman, such theory types are not impossible. The negative thesis is a thesis against externalist content-dependent theory types. If the account of the individuation of normative concepts I have sought to tease out of Gallie's important work is correct, we will have cause to doubt the plausibility of externalist content-dependent theories. To the extent that such concept individuation requires access to criteria by which to determine the propriety of proposed applications of concept terms, externalist approaches are unhelpful. Again, for reasons which underlie Gallie's doctrine, they do not tell us how to go on, and *that* is what matters in normative inquiry. This result is, of course, somewhat ironic since Kronman relies upon Gallie's doctrine to precisely the opposite effect. Kronman takes the essential contestedness of normative concepts to show procedural theories to be implausible. Unfortunately, Kronman presents no arguments for this conclusion. I take myself to have shown that he is mistaken in his assessment of the significance of the essential contestedness of normative concepts. Finally, I take myself to have shown how a procedural theory is not prevented from appealing to substantive concerns in answer to allegations of arbitrariness. Such appeals will not render the theory in question substantive, provided that the application criteria for the theory-terms are procedural. My claim then, is that this discussion has presented powerful reasons for supposing that, quite contrary to Kronman's conclusion, plausible normative theories and so plausible theories of contract, will be internalist and content-independent. In the remaining chapters of this thesis I propose to re-examine some of the contract theories presented earlier in order to give a more specific indication of the types of relational procedural properties a proper theory of contract might rely upon.

Chapter Six

The Will Theory of Contract

I hope to have shown not only that internalist content-independent theories of contract are possible, but that they are the more plausible of the two alternative contract theory types. My conclusion so far is that a proper account of contract will be procedural. In this chapter I begin a re-examination of some of the theories of contract presented in Chapter two above. This chapter is concerned with the will theory of contract. I have both general and specific hopes for this re-examination. As a general matter, I hope to give an indication of the potential of the analysis of normative theory offered in this thesis. To that end, I address issues which arose in the earlier presentation of will theory, suggesting that application of the analysis developed in the intervening chapters sheds light upon those issues. I hope as well to provide a more specific indication of the nature of the properties upon which a theory of contract might rely. Again, the account offered in this more specific endeavour will be consistent with and prompted by the analysis of normative theory and concept individuation presented in this study.

I begin with the general endeavour. In our initial characterisation and discussion of will theory I remarked upon a classificatory difficulty posed by certain versions of that theory to which I said we would return later in the study.[1] The discussion in the last two chapters provides us with an analysis which can usefully be applied to this difficulty. The analysis will help to indicate the nature of the problem, and the application will help to further clarify the analysis. As we have seen, will theory rests contractual obligation upon a certain kind of respect for the wills of contracting parties. I suggested that the western history of ideas contained two sorts of justifications or explanations of this special respect. One account, which I associated with Kant, proposes that acts of will are *intrinsically* valuable, while the other takes them to be *instrumentally* valuable. The classificatory difficulty is posed by the instrumental versions of will theory. According to these theories, acts of will are valuable because some other thing which is valued is furthered or promoted by a system which places a high value on acts of will. Here, will is valued as an instrument or means to that which is valued intrinsically, or nonderivatively, or noninstrumentally. In our initial discussion I offered John Stuart Mill as an example of this approach from the field of general social and political philosophy. Mill valued happiness intrinsically or nonderivatively. At the social or political level, he supposed, the way to promote happiness was to respect acts of will. According to the view I imputed to Mill, then, a social or political system which placed a high value upon acts of will would generate and foster happiness.[2] Since happiness is valued so is will, since the latter is taken to be a means to the former.

---

[1] See Chapter Two above.
[2] See Chapter Two above.

We saw that in its purest form will theory was premised upon the idea that acts of human will were to be valued in a way which meant that their *mere occurrence* provided courts with reasons to act in certain ways. If we insist upon this understanding of will theory, it seems that we cannot ground a will theory on an instrumental account of the value of will. This will be so since such instrumental accounts, by their very nature, reject the idea that the *mere* occurrence of acts of will (or, for that matter, of acts of any other kind) settles anything; such an occurrence will do so only if it is the case that in any actual situation, that occurrence in fact militates toward that which is valued intrinsically. Acts of will, then, provide an instrumentalist with reasons to act one way rather than another only if they occur in conjunction with some 'extra' set of facts. The mere occurrence of an act of will will not be sufficient.

This feature of instrumental accounts connects with the analysis of normative theory which has been offered in this thesis. According to will theory, the content of contracts is irrelevant to determinations of contractual obligation. What matters is *that* the parties have joined in the appropriate act of will. Contractual obligation will arise on whatever terms are so willed. Further, the existence and extent of contractual obligation is to be determined by reference to the features of the relationship between the parties and not to what we have called externalist considerations. Will theory, then, seems to be paradigmatically internalist and content-independent. Instrumental versions of will theory may seem to threaten this classification. There, what seems to matter is not will itself, but some other thing, perhaps happiness or efficiency, which is taken to be promoted by respect for will. On an instrumental account, what is *really* valued is that which is valued nonderivatively. To the extent that the value of that thing, whatever it happens to be, is to be explained independently of specific contractual relationships, the contractual theory which gives a high value to will because of the value of that thing, may seem to be externalist.

Take it for the moment that the instrumental version of will theory is most nearly represented in contemporary contract theory by certain versions of the economic theory of contract law. These theories are premised upon the idea that systems which respect the acts of will of contracting parties will be peculiarly efficient. The fundamental principal from which the analysis proceeds is that if voluntary exchange is permitted - if courts respect acts of will - resources will gravitate toward their most valuable uses. Here the respect accorded to acts of will is not accorded because of any intrinsically valued feature of will itself, but because of the perception that respect for will promotes that which the economic liberals do value. The threat of externalism is illustrated by these economic theories. The seminal work in the area is Ronald Coase's 'The Problem of Social Cost'.[3] There, Coase argues, in short, that where transactions are costless and individuals cooperate, they will achieve an efficient distribution of resources whatever the initial assignment of legal rights. This conclusion, the 'Coase Theorem', advocates minimal regulatory interference with contract since it shows such interference to be otiose. The theorem, then, is an instrumental justification of something like the proposition we have identified as lying at the heart of the will theory - the idea that the mere occurrence of an act of will should be taken by courts as reason to act in certain ways, viz., to enforce the agreement recording that act of will. This will be the way to produce the most efficient distribution of resources (which the economic theorist values nonderivatively). But note that the Coase Theorem proceeds from and relies upon an assumption of minimal transaction costs. Where transaction costs are not zero (or trivial), unrestricted negotiation will not produce efficient distributions. Given the failure of Coase's assumption, *ceteris paribus*, the economic theory of contract law will advocate regulatory interference or its equivalent in order to promote efficiency.

---

[3] Ronald H. Coase 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1

This 'regulatory response' is evident in the work of the most influential post-Coasian contributor to the law and economics movement, Richard Posner.[4] Posner argues that where transaction costs are low courts should take their guidance solely from the wills of the contracting parties: if the parties could have negotiated a contract, Posner recommends a result consistent with the central recommendation of the will theory. Where transaction costs are high, however, according to Posner, the courts properly go beyond the actual wills of the parties, and create a contract for the parties on terms which the parties would have created had transaction costs not been too high: if the parties could not have negotiated a contract because of prohibitive transaction costs, Posner recommends a result inconsistent with the central recommendation of the will theory.[5] In either case however, whether the economic theory advocates something like the will theory, will depend not upon the occurrence of a 'mere' act of will, but upon the occurrence of such an act given certain empirical conditions.

I suggested when presenting instrumental versions of will theory and the problems they posed for the proper treatment of that theory, that one way to avoid the conclusion that such theories were externalist, was to distinguish between the *criteria* of obligation a theory put in place and the *explanation for the selection* of that criteria. The discussion in the last two chapters may indicate what I had in mind when referring to this distinction. The account of normative theory and concept individuation which has lain behind much of the discussion in the last two chapters is one which suggests how it might be the case that a theory leads to definitions of concepts, a full explanation of which requires reference to externalist concerns, but which is none the less internalist. The discussion in the last two chapters, then, connects with and gives an account of those earlier remarks about the proper classification of particular normative theories. Though a full account of a theory might require reference to substantive concerns, such concerns typically fulfilling an *explanatory* role, the nature of the theory will be determined by its account of concept individuation. The discussion in the last two chapters has attempted to show why, where that individuation is procedural, or internalist and content-independent, the theory will properly be thought of in those terms as well, notwithstanding that it allows an explanatory role to such substantive concerns. The point here is that instrumental theories of contract, or instrumental normative theories generally, might be internalist and content-independent where they propose and rely upon criteria of concept individuation which are internalist and content-independent, regardless of the nature of the explanation or the substantive reasons for that reliance.

---

[4] See Richard Posner *Economic Analysis of Law* (Boston; Little, Brown, & Co., 1977) passim, but especially 97-98

[5] This conclusion might seem a little quick. Note of course that Posner's suggestion is still in some sense Coasian, and so still in some sense consistent with the will theory, since Posner recommends that courts create the contract the parties would have created had Coase's assumption as to zero transaction costs obtained.

This discussion connects in turn with a more general debate as to the adequacy of instrumental accounts of law and its institutions which we will usefully explore at this point. Ernest Weinrib illustrates the connection when he complains, against what we have called externalist content-dependent accounts of private law, that:

> The dominant tendency today is to look upon the content of law from the standpoint of some external ideal that the law is to enforce or make authoritative. Implicit in contemporary scholarship is the idea that law embodies or should embody some goal (eg wealth maximisation, market

> deterrence, liberty, utility, solidarity) that can be specified apart from law and can serve as the standard by which law is to be assessed. Thus law is regarded as an *instrument* for forwarding some independently desirable purpose given to it from the outside.[6]

By contrast, he writes later, according to the account which preserves what he calls the 'autonomy of law':

> ... law has a content that is not imported from without but elaborated from within. Law is not so much an instrument in the service of foreign ideals as an end in itself constituting, as it were, its own ideal.[7]

Here an instrumental conception of law is taken to be one which relies for its justification or elucidation upon something external to law: the law is conceived of as the instrument for the attainment of some external goal or standard. In these passages, Weinrib seems to treat externalism and instrumentalism as equivalent. The suggestion seems to be that internalism provides a noninstrumental conception of law, in contrast to the instrumental conception provided by externalism. I hope the discussion in the preceding few pages will show why the assumption of this equivalence should be treated with some care. The account of concept individuation advanced in this thesis does not deny the significance of substantive or substantive concerns of the kind that might be expected to make up Wienrib's external goals. It claims, however, that such concerns are unable to function directly in concept individuation. Such an approach allows the possibility of an instrumental account of, say, contract which retains its internalism or autonomy. Instrumentalism is not inevitably associated with externalism. We can put this claim in the language of the current discussion by saying that that which is valued noninstrumentally has only an *explanatory* role. That role does not threaten the internalism or autonomy of the account of concept individuation itself, since such individuation is to be performed by reference to properties which are themselves internalist and content-independent.

---

[6] Ernest Weinrib 'Legal Formalism: On the Immanent Rationality of Law(1988) 97 *Yale Law Journal* 949, 955

[7] Ibid, 956

This distinction between explanation and criteria, should lead us to treat with some caution many contributions on both sides of the debate as to the 'merely instrumental' status of law and its institutions. Contributors are, it is suggested, often guilty of misunderstanding the significance of the conclusion as to the instrumentality of law. For one thing, on the account favoured here, the conclusion that contract, say, is best understood from an instrumentalist perspective will not entail that contract is properly understood as an externalist institution. If contract establishes internalist *criteria* for legal judgments, the fact that the selection of such criteria is to be *explained* by appeal to externalist considerations, will not of itself show contract to be externalist. The belief that the instrumentalism of law takes us directly to an externalist theory of contract flows, again, from a failure to to recognise a distinction between explanation and criteria, which distinction is comprehended within the fundamental distinction between internalist content-independent and externalist content-independent approaches to normative theory.

An appreciation of these distinctions may also lead us to believe some of the motivation to *deny* the instrumentalism of law is reduced. Such denials are likely to be motivated by the perception that instrumentalism is incompatible with something like the liberal conception. But that perception is mistaken. The instrumental status of contract, if such a status could be sustained, would not, of itself, lessen the priority of contractual criteria. One way to put this point is to claim that there might be an *autonomous instrumental* conception of law. Law might grant status according to internal criteria while conceding that an adequate explanation of law, which might specify, for instance, why it appeals to the criteria it does, can only be given by appeal to concerns external to law itself. And nor need a conclusion that contract is best understood instrumentally reduce the significance of contract.

These remarks may seem to go against a long tradition, reaching back at least to the first book of the *Nichomachean Ethics*, which holds instrumental accounts in disdain. Instrumental accounts are almost without exception taken to be less compelling than non-instrumental accounts. There will be a sense in which this will be trivially true. If called upon to rank something, *y*, important for its own sake, and something *x*, important only insofar as it produced *y*, it seems natural to suppose that we will rank *y* above *x*. If we could have one or the other, since, *ex hypothesis*, we only want *x* to get *y*, surely we would choose *y*. But we need only suppose that *y* can *only* be attained by the use of *x*, to grant *x* considerable value. Some such view, of course, is just what lies behind the account of concept individuation advanced by this thesis. Given a need to settle the scope of normative terms such as contract, and given the absence of a sufficiently widespread and detailed consensus about the proper application conditions for such concepts, we are driven to reliance upon procedural systems which are conceded to be mere *modus vivendi*. It may be that to give a full account of why we have the procedures we have we must appeal to some external consideration. But, again, that does not show the system itself to be externalist or threaten the significance of the system.

I want to return now to a somewhat narrower focus upon will theory, in pursuit of the more specific endeavour sketched in the introductory remarks to this chapter. My claim here is that a proper understanding of the weaknesses of will theory leads us a little closer to an appreciation of the form of an adequate theory of contract. The point is this: there is an almost universal consensus that will theory cannot provide an explanation or justification of contract. The most common reason for this assessment is the fact that will theory, whether in instrumental or intrinsic guise, portrays contractual obligation as resting upon the internal mental states of contracting parties; will theory, writes Patrick Atiyah, is committed to "the somewhat mystical idea ... that an obligation could be created by a communion of wills, an act of joint, if purely mental procreation."[8] This feature of will theory, the claim goes, renders it both descriptively and theoretically inadequate - contract has never relied upon internal mental states as criteria of obligation and could not rely upon such states even if it wished to do so. In fact, even while paying lip-service to will theory, contract has always required some *public manifestation* of will.[9] The most common objection to will theory, then, is the claim that while that theory is premised upon the idea that acts of human will are to be valued in a way which means that their *mere occurrence* provides courts with reasons to act in certain ways, in fact contract inevitably requires more than the mere occurrence of an act of will, since it also requires the manifestation of will in public actions or expressions.

The idea that external manifestations of will are at least necessary to found promissory or contractual obligation seems to have had almost universal support. Even among those natural lawyers who supposed acts of will to be naturally and intrinsically valuable, there seems to have been consensus as to the implausibility of accounts of contractual obligation which purported to rely purely upon internal mental states. In giving the classical natural law account of promise, Grotius says this:

---

[8] Patrick Atiyah *The Rise and Fall of Freedom of Contract* (Oxford; Clarendon Press, 1988) 407

[9] See footnote 13 below, for authorities.

> As regards the mode of making a promise, that ... requires an external act, that is an adequate indication of intent, for which sometimes a nod may suffice, but more often the spoken word or writing is required.[10]

And Pufendorf this:

> ... the signs by which consent is expressed ..., indeed, are necessary in order to make an obligation, since acts of will, so long as they are not manifested by signs, can have no effect among men.[11]

Similar remarks can be found throughout the legal material. The upshot is that contract has never looked just to the internal mental states of contracting parties to establish contractual obligation. Contractual status is to be determined not by reference to the content of the parties' minds, but by reference to what they have said or written or done. The proposition is stated in short and representative fashion by Martin CJS of the Saskatchewan Court of Appeal when he writes that "[i]n order to bring a contract into existence there must be communication of the parties' intention by means of an outward expression."[12] So universal is appreciation of this feature of contract that commentators seem forced to extraordinary lengths to find examples of "pure will theory". Patrick Atiyah, for instance, cites Kindersley VC's judgement from *Haynes* v *Haynes* [13] as a specimen, but in that case the Viscount writes this:

> A contract ... is an agreement upon sufficient consideration to do or not to do a particular act.... [I]n order to constitute an agreement or contract, two things are requisite - 1stly, the will; and, 2dly, some act, whether in word or deed, whereby that will is communicated to the other party. No

---

[10] Hugo Grotius *On the Law of War and Peace* (1646) II.XI.IV

[11] Samuel Pufendorf *The Law of Nature and Nations* (1688) III.VI.16

[12] *Thierry* v *Thierry* (1956) 2 DLR (2d) 419, 425 (Sask CA) per Martin CJS

[13] (1869) 1 Dr & Sm 462; 62 ER 442

> man has entered into an agreement or contract ... unless he has willed that the thing should be done or forborne, and also has communicated that will to the other party by some act engaging to carry it into effect....[14]

For this passage to count as evidencing belief in the possibility of the creation of contractual obligation by "an act of purely mental procreation" as Atiyah suggests, we need to follow him in disregarding both the explicit and enumerated requirement for "some act, whether by word or deed, whereby that will is communicated to the other party", as well as the reference to consideration. As it stands this passage does not evidence Atiyah's 'somewhat mystical idea' at all. This of course is not to rescue will theory, if by will theory we mean the theory that contractual obligation rests upon internal mental states of some description. The point is rather that contract doctrine offers little evidence that a pure or naive version of that theory ever had currency.

There seems, then, to be widespread appreciation, even among will theorists themselves, of the need not only for internal mental states or acts of will, but also for some external manifestation of those states.[15] Beyond this point, however, there seems to be much less appreciation as to just what the ubiquitous requirement for external manifestations of will means for will theory in particular and for contract theory in general. I will suggest that failure to appreciate these further issues leads commentators such as Atiyah into a fallacy which consists in confusing two senses of 'private' and 'public', or 'internal' and 'external'. Ultimately, I will claim, these commentators suppose that showing that contract cannot be internalist (or private) in one sense, allows them to conclude that it must be internalist in another, and that showing that contract must be externalist (or public) in one sense allows them to conclude that it cannot be externalist in another. But the move between the two senses of private and public, internalist and externalist, involves an objectionable equivocation.

---

[14] Ibid at 433 of the Dr & Sm, and 445 of the ER report, per Kindersley VC. Atiyah also cites, but does not quote from, *Pole* v *Leask* (1863) 33 LJ Ch 155; *Dickinson* v *Dodds* (1876) 2 ChD 463, and *Cundy* v *Lindsay* (1873) 3 App Cas 459. Suffice to say that these cases do not seem to me to exemplify the pure will theory any better than *Haynes* v *Haynes*.

[15] Relevant authorities here are legion. A sample may include, as well as the cases cited above, reference to Chief Justice Brian's famous and ancient dicta from *Anon* (1477) YB 17 Edw 4, fol 1, pl2, a case concerned with a sale of goods, that "the intent of a man cannot be tried, for the devil himself knows not the intent of a man" and to Lord Eldon's insistence in *Kennedy* v *Lee* (1817) 3 Mer 441, that his task was not "to see that both parties really meant the same thing, but only that both gave their assent to that proposition which, be what it may, de facto arises out of the terms of their correspondence." Chesire and Fifoot derive the standard view from these and other authorities, which they state so: "In the common law, therefore, to speak of 'the outcome of consenting minds' or, even more mystically, of *consensus ad idem* is to mislead by adopting an alien approach to the problem of agreement. The function of a judge is not to seek and satisfy some elusive mental element but to ensure, as far as practical experience permits, that the reasonable expectations of honest men are not disappointed. This is often compendiously expressed by saying that common law adopts an objective test of agreement." *Law of Contract* 7th New Zealand edition (Wellington; Butterworths, 1988) 31.

We can begin to get some idea of the significance of the need for external expression of will by looking at the sort of arguments which might lie behind the assertion of that need. By seeing how one might argue for the idea that the 'external expression requirement' is not optional, we can see what does and what does not follow from the requirement.

David Hume suggests one possible approach. Hume concurs with those who insist upon expression. He writes that:

> It is evident that the will or consent alone never transfers property, nor causes the obligation of a promise (for the same reasoning extends to both) but the will must be expressed in words or signs in order to impose a tye on any man.[16]

For Hume, 'justice arises entirely from its usefulness to society', and his argument for the claim that an act of will alone cannot create obligation is ultimately an appeal to usefulness or utility. Public indignation arose against those who promoted a pure will theory of obligation, he reports, 'because everyone perceived that human society could not subsist were such practices authorized'.[17] Hume writes this:

---

[16] David Hume *An Enquiry Concerning the Principles of Morals* eds. T.H. Green and T.H. Grose (London: Longmans, Green and Co; 1875) Sec.III. pt II footnote.1.

> If the secret direction of the intention, said everyman of sense, could invalidate a contract, where is our security? And yet a metaphysical schoolman might think, that where an intention was supposed to be requisite, if that intention had no place, no consequence ought to follow, and no obligation be imposed.[18]

The problem Hume highlights is of course singularly germane to contract law. What I have termed pure will theory founds contractual obligation upon the acts of will of contracting parties. The theory gives priority to what has been called the subjective viewpoint.[19] But this priority places would-be contractors in an extremely vulnerable position. Legal preference for a promisor's actual state of mind may well disappoint a promisee who has acted in reliance upon actions they took to evidence a particular state of will. And note that the vulnerability might be generated by both *bone fide* and fraudulent or cynical promisors. The pure will theory's preference for or reliance upon subjective states seems to lead as readily to *mistaken* promisees disappointed by bone fide promisors, as it does to *defrauded* promisees disappointed by dishonest promisors who have avoided or manipulated contractual obligation by asserting appropriate states of will as it suits them.

Hume's 'pragmatic' point, applied to the case at hand, is that the pure will theory's reliance upon factors inaccessible to both promisees and third parties threatens to greatly reduce the reliability of contractual commitments. The 'subjectivist' element of the pure will theory clashes with the pragmatic need for a 'public' system of contract - a system which allows contractors to determine the presence or absence of the criteria necessary to found contractual obligation. Where those criteria are not public, entering into contracts becomes a lottery. If it is the case that we value contract because we value the security provided by a system which allows future commitments, Hume's point seems to show that such a system must look not to internal mental states, but to external manifestations of such states.[20]

---

[17] Ibid

[18] Ibid

[19] Cf the reference to 'the objective approach' in the passage from Cheshire and Fifoot *Law of Contract* quoted at footnote 15 above.

A second, connected, approach here looks to the role of phenomena such as contract and promise as instruments for co-ordination. A good deal of work has been done on the constraints upon such instruments, and I do not intend to attempt a full treatment here.[21] The relevant point is that in many areas of human endeavour it is necessary, or at least desirable, that I coordinate my activity with that of others. I drive on the right side of the road when in Canada, and I do so because I expect others to drive on the right side of the road, and because others expect the same of me. The rule of the road has a public aspect, which arises because individuals cannot be expected to keep either to the left or the right unless they can reasonably expect others to do the same. "The actions of each", Hume remarks, "have reference to those of the other."[22] The argument against the 'subjectivity' of pure will theory consists in the claim that the required mutual expectations cannot arise unless those involved have grounds to arrive at reliable beliefs about what others will do and what they expect still others (including me) to do. And these grounds, the claim goes, must be 'public' or 'external' - I cannot arrive at reliable beliefs about what you will do and what you expect unless the relevant evidence is available for scrutiny. If these considerations are compelling, and if contract is appropriately regarded as an instrument of co-ordination, then what we have called the subjectivity of pure will theory seems to rule it out as an adequate account of contract.

---

[20] Randy Barnett relies upon this Humean point to dismiss will theory, in an article we have discussed at length already, when he writes this: "Because the subjective approach relies on evidence inaccessible to the promisee, much less to third parties, an inquiry into subjective intent would undermine the security of transactions by greatly reducing the reliability of contractual commitments. Not surprisingly, and notwithstanding the logic of of obligation based on 'will', the objective approach has largely prevailed." 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 273.

[21] See especially David Lewis *Convention: A Philosophical Study* (Cambridge, Mass; Harvard University Press, 1969) passim; Lon Fuller *Anatomy of Law* (New York; Mentor, 1969) 116; John Rawls *A Theory of Justice* (Cambridge, Mass; Belknap Press, 1971) 55-56; D.S. Schwayder *The Stratification of Human Behaviour* (London; Routledge, & Keegan Paul, 1965) 252-253.

[22] David Hume *A Treatise of Human Nature*, Selby-Bigge edition (Oxford; Clarendon Press, 1978) 490

It is perhaps worth making explicit here that nothing said so far establishes that the evidence for others' intentions and expectations must be explicit statements. Hume gives the example of two rowers who manage to coordinate their rowing "tho they have never given promises to each other."[23] But note that even here the rowers have a good deal more than mere acts of will to go on. The case illustrates that in a sufficiently simple situation, I can come to the required beliefs about my fellows' intentions and expectations by observing what they do. This is evidence that *explicit undertakings* will not always be required for co-ordination, but it is not support for the radical subjectivity of pure will theory.

A third approach to the question of the necessity of external manifestations of will is suggested by the well known 'private language argument'.[24] Although that argument lends itself to a number of construals, in recent times at least some version of the following has been widely accepted.[25] The argument maintains that language is a rule governed phenomena, and claims that this feature means that speakers must have criteria available by which to establish linguistic rules and to determine whether those rules are being followed by themselves and others. The claim is that where these 'application criteria' are in a certain sense private, they could not serve this function. There is, the argument goes, nothing about the intentions, convictions, or feelings of a speaker which allows that person to establish whether they are following a rule correctly or not - a speaker intending to follow a rule, disposed to proffer a given application, convinced that the rule has been followed, and with the strongest feelings that the right answer has been produced *might be wrong,* and nothing internal to the speaker allows them to determine that fact. We require criteria independent of speakers to provide the appropriate test. Language use must 'bump up against the world' if language is to be possible.

---

[23] Ibid

[24] The argument of course originates in Ludwig Wittgenstein's *Philosophical Investigations* (Oxford; Basil Blackwell, 1953) para 243ff.

[25] The best known statement of this construal is Saul Kripke's *Wittgenstein on Rules and Private Language* (Oxford; Basil Blackwell, 1982).

Now in-so-far as the private language argument shows that external criteria are required for language, it might, it seems to me, be used to bolster the arguments given above to the effect that the radical subjectivity of pure will theory is implausible. If we accept the conclusions of the private language argument, then it simply cannot be the case that the criteria for the application of contractual terms (such as 'contract') are 'internal' to agents, as the pure version of the will theory asserts.

We can usefully take this last point a little further. There has been a good deal of debate over the identity of the Wittgensteinian private linguist.[26] Will the argument go through for Robinson Crusoe, or for Robinson Crusoe raised by wolves, or only for Robinson Crusoe's disembodied cartesian soul? It has been argued, convincingly it seems to me, that the interpretation of the argument offered above lends itself to the last of these alternatives.[27] The point for now is simply that both of the embodied Crusoes *can* bump up against the external world in a way which gives them access to independent (because external) application criteria. I do not wish to pursue this debate here. What I do want to do is to draw attention to the way in which the preceding discussion connects with certain views in the philosophy of language and mind. On the reading in which the private linguist is a disembodied cartesian soul, the view the private language argument attacks - roughly the idea that the application criteria for language are internal and private states of linguists - flows from a dualist conception of personal identity. That conception has been attacked on a number of the grounds, including that which asserts that it commits us to an account of the ascription conditions for the names of mental states according to which those conditions are radically private. For reasons roughly similar to those lying behind the private language argument, this criticism of dualism asserts that the doctrine cannot give an account of our knowledge of the mental states of others. Unless the criteria for the use of the names of mental states are public, those terms are said to be meaningless. The conclusion from the philosophy of mind and the philosophy of language places constraints upon the institution of contract.

---

[26] See especially, Newton Carver 'Wittgenstein on Private Language' (1959-60) 20 *Philosophy and Phenomenological Research* 389-396; Stuart Candlish 'The Real Private Language Argument' (1980) 55 *Philosophy* 85-94; John W Cook 'Solipsism and Language' in A Ambrose and M Lazerowitz (eds) *Ludwig Wittgenstein: Philosophy and Language* (London; Allen and Unwin, 1972) 37-72; Anthony Kenny 'Cartesian Solipsism' in G Pitcher (ed) *Wittgenstein* (London; MacMilan, 1971) 352-370; Stephen Davies 'Kripke, Crusoe and Wittgenstein' (1988) 66 *Australian Journal of Philosophy* 52-66

These arguments, it seems to me, allow us to conclude that the radical subjectivity or epistemological internalism of pure will theory shows that theory to be implausible. The theory fails to take account of the necessary publicity of institutions such as contract, and, more sweepingly, of the necessary publicity of the language in which contract must be expressed.

---

[27] See, for instance, Stephen Davies 'Kripke, Crusoe and Wittgenstein' (1988) 66 *Australian Journal of Philosophy* 52-66

Although these arguments are left unarticulated by commentators who declare will theory implausible because it requires resort to external expressions of will, they lie behind such declarations. The significance of the implausibility of a radically subjective or internal theory of contract, for will theory and for contract theory generally, is determined by the content of these arguments since they provide the grounds for that implausibility.

Before attempting to draw conclusions as to the significance of the implausibility of will theory from these arguments, I want to simply note a possible objection to this conclusion to which we will return toward the end of this chapter. Some might want to claim that these remarks do not force a very serious concession from will theory. It might be the case that the question of obligation *still* turns upon the mere occurrence of an act of will, with the extra complication that that act needs to be be evidenced in the public domain. Some such a view might be seem evident in judicial remarks such as the following:

> In the field of contracts, as generally elsewhere, [w]e must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpresssed intention.[28]

On the one hand, this remark is consistent with what has been said about the need for contract to rely upon external conduct. The remark might seem to support the 'evidence objection' just sketched, however, since even while diminishing the role of 'secret and unexpressed intention', the court talks of employing outward expressions as manifestions of just such intention. The work might seem still to be done here by the will, the expressions having only an evidential role. The expressions themselves seem to be given little normative significance. As noted we will return to this objection toward the end of the chapter.

---

[28] *First National Exchange Bank of Roanoke* v *Roanoke Oil Co.* 169 Va 99, 114 192 SE 764 770

I have been concerned so far to characterise pure will theory as offering 'subjective' criteria by which the existence and scope of contractual obligation is to be determined. So characterised the theory cannot give an adequate account of contract since such an account must employ public or external criteria. One way to put this claim, is to say that an adequate theory of contract must satisfy a 'publicity condition'. Contract must be public, and cannot be private. Once the point is put this way, we can draw attention to a confusion in discussions of contract. The confusion consists in a failure to distinguish between two senses of public and private. The private language argument turns upon one kind of distinction between public and private. Here the question is whether the application criteria for linguistic terms are internal (i.e. private) or external (i.e. public). As we have seen in the preceding chapters of this study, however, these notions of 'internal' and 'external' have an alternative meaning in the context of the current debate. Here they mark a distinction not between those criteria which are 'internal' to a particular contracting party and those which are not, but instead between criteria of contractual obligation which are internal to particular contractual relationships and those which obtain prior to and independently of such relationships. The former is a distinction in the philosophy of mind and language, while the latter is a distinction in normative philosophy.

The normative senses of public and private are manifest in the common lawyer's distinction between public and private law. It will pay to digress a little here to introduce this latter distinction in some detail. The distinction between public and private law is very common in legal theory. The institutions of tort and contract, proponents of the division assert, belong to the sphere of private law while (paradigmatically) the law of crimes belongs to that of public law. Cursory examination of this apparently unitary division reveals that it is in fact comprised of a number of related factors. It is motivated and justified in part by:

> 1) The idea that *enforcement* of the norms of the two spheres is on the one hand private and on the other public, in the sense that in crimes we rely upon public officials to enforce the relevant standards while in contract and tort that responsibility falls upon private individuals who must detect breaches, and initiate and conduct litigation, and;
>
> 2) The perception that the *harms* with which the two spheres are concerned are on the one hand private and on the other public, and;
>
> 3) The idea that the *standards which are enforced* in the two spheres are on the one hand private and on the other public. The point here, according to the traditionalist, is that the standards or duties enforced in particular contracts are created (privately) by the parties and not (publicly) by the community.[29]

For our purposes, of course, it is the third of these factors which is the most significant. Beyond the fact that it is this factor which echoes our distinction between (normative) internalism and externalism, there are a number of other reasons for this assessment. First, there seems to be reason not to grant priority to the first two factors. The first factor seems most plausibly regarded as a contingent institutional arrangement in need of some explanation or justification such as an appeal to the second or third factors might be expected to provide. A community which valued the system of exchanges made possible by an institution of contract much like the one we have *primarily* for its social utility, so which took the harms involved in a breach of contract to be harms to the public (ie whose perception was the opposite to that specified in factor two), might be expected to make the detection and enforcement of such breaches a public responsibility. The enforcement arrangements we have are motivated by our perception of the nature of the harms and standards involved in contract, rather than the other way around. The first factor, then, does not on its own seem to explain the distinction between public and private law. It must itself be explained by something like the last two factors. As for the second factor, note that trespass and assault, for example, are both torts and crimes in most jurisdictions. Similarly, negligent breach of contract either does give rise to concurrent liability in contract and tort, or would do so were it not for specific institutional prohibitions.[30] These are examples of the same act giving rise to actions in more than one of the legal categories. The *harm* complained of in these concurrent actions seems to be the same. It seems unlikely, then, that the categories are properly distinguished by the *type* of harm over which a given institution has jurisdiction. Finally, the third factor may seem to be the most significant since only it, of the three, 'singles contract out', allowing us to distinguish contract not just from crimes, but also from tort. The idea here is that the norms and standards of contract, like those of tort, are enforced privately. But unlike the norms and standards of both torts and crimes, the traditionalist claims, the norms and standards of contract are created by the parties. The duties the state is called upon to enforce are self-imposed and, so the claim goes, in the relevant sense private. We have already seen the importance of this feature to a discussion of the nature of contract law.[31] The idea that contract and tort have merged lies behind an influential critique of the liberal conception. A common way to express the claim that contract law has become more (normatively) externalist or public and less (normatively) internalist or private, is to claim that contract and tort have merged.[32] The idea here is that contract and tort have merged toward the 'public' standards of tort, where the publicness in question is that constituted by the fact that the standards of tort are created by the state or community.[33] The point for now is that this third factor directs attention to a distinction between the source and nature of legal norms. Those of private law are created by the parties - they arise within specific legal relationships. Those of public law are created by the state or community and obtain prior to and independently of specific relationships. This is to say, of course, that the norms of private law are normatively internalist, while those of public law are normatively externalist. The third factor echoes the distinction between normative internalism and normative externalism which has provided a framework for much of this study.

---

[29] The public/private law division is nicely presented by Jules Coleman in his contribution on philosophy and the private law in Jeffrie G Murphy and Jules L Coleman *Philosophy of Law: An Introduction to Jurisprudence* (Revised Ed) (Boulder, San Francisco, and London; Westview Press, 1990) 143-146

---

[30] *Rowe* v *Turner, Hopkins, & Partners* [1982] 1 NZLR 178, 181. The argument against such prohibitions is that there is nothing in the *nature* of contract or tort, or in the distinction between public and private law *per se*, to prevent such concurrent liability. If tortious liability is not excluded by the terms of the contract, there seems no reason that the mere *existence* of a co-extensive contractual duty should exclude a tortious duty that would otherwise apply.

We have then, a sense in which public and private refer to a distinction in the philosophy of mind and the philosophy of language, and a sense in which they refer to a distinction between legal institutions which impose standards upon parties, and those which enforce norms the parties have created for themselves. This latter distinction, I have suggested, echoes that between normative internalism and normative externalism. I have remarked that there is an almost universal consensus that pure will theory could not be an adequate account of contract since it portrayed contract as radically private. The arguments which supported that consensus, I suggested, went to show that contract could not be private where private referred to one side of the distinction in the philosophy of mind and language. Those arguments do not bear upon the question as to the normative internalism or externalism of contract. It would be fallacious, then, to suppose that the necessary publicity of contract meant that contract was public law. But a number of commentators seem to suppose just this.

---

[31] See Chapter One.
[32] See Chapter One.
[33] See Chapter One.

Consider, for instance, Patrick Atiyah's treatment of will theory. Atiyah takes a will theory of contract to be a theory which insists that contractual obligations are created by the parties, rather than by the law. Will theories then, on Atiyah's account, portray contract as private law. They are to be contrasted with theories which portray contract as public law. All of this seems sound enough. But when Atiyah comes to characterise the demise of will theory, he concentrates not upon the rise of a conception of contract as public law - in the normative sense of public law noted above - but instead upon the advent of an appreciation of the implausibility of a conception of contract which relied solely upon internal mental states - upon, again, 'the somewhat mystical idea that an obligation could be created by a purely mental act of procreation.'[34] So conceived, maintains Atiyah, will theory was 'too theoretical to last long, or to be taken too literally while it did last'.[35] He continues:

> The Courts continued ... to talk of contracts as created by and dependent upon the intentions of the parties, but at the same time they were busy objectivizing the means of proving intent. Intent was a verbal formula; the reality was external signs and manifestations of intent.[36]

---

[34] Patrick Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon press; Oxford, 1988) 407

[35] Ibid

[36] Ibid 407-408

I have no quarrel with this as an explanation of the demise of will theory. But note that it relies upon the implausibility of an epistemologically internalist conception of contract. What the courts Atiyah appeals to appreciated, was the need for external signs of intent. But to suppose that this supports the contrast between will theory and those conceptions of contract which allow courts a role in imposing contract terms upon parties is to confuse two distinct issues. We have seen that contract cannot be private where private means epistemologically internalist, but nothing said so far warrants the conclusion that contract cannot be private where private means that the parties, and not the State or the community, create their own contractual terms.

Again, we see the result of the failure to distinguish carefully between these two senses of private, it seems to me, when Atiyah writes elsewhere that what is "surprising" about the history of will theory :

> ... is that English common lawyers ... adopted an extreme form of objectivism in the law, while, at the same time, they were developing the classical model of contract with its emphasis on free choice and consent.[37]

Atiyah finds this surprising, I take it, because he thinks that the two movements - toward objectification and toward freedom of contract - are contradictory. But it is important to see that we are not committed to this contradictory course *just* because courts began to suppose that 'intent was a verbal formula, while the reality was external signs'. There is nothing in a commitment to the need for external criteria of obligation, which prevents a simultaneous rejection of a conception of contract as public law. There is then, no need for Atiyah's surprise at the concurrent occurrence of the two movements. He could, I suggest, have been less surprised had he noted more carefully the distinction between the two senses of public and private.[38]

---

[37] Patrick Atiyah *Promises, Morals, and the Law* (Clarendon press; Oxford, 1981) 15

I want to return now to what I earlier called the evidence objection. After presenting the arguments which I suggested lay behind the almost universal consensus that will theory was implausible, I sketched a possible objection to the conclusion that those arguments did indeed show the implausibility of an account of contract which relied upon epistemologically private criteria of obligation. That objection responded by claiming that the arguments presented did not require a very large concession from will theory. The idea was that the arguments which claimed that any plausible theory of contract had to take into account the need for external expressions of will, showed only the need for external *evidence* of the presence of the required internal states, and not that those internal states could not count as criteria for contractual obligation.

It is worthwhile noting first that there is reason to think that the 'evidence' objection does not seem to be supported by legal practice. We can bring this conclusion out so: It is certainly true that a number of the common contractual defences turn upon claims that there has not been the appropriate act of will.[39] Traditionally, for instance, fraud and duress have been understood to operate as defences because they vitiate the will of the effected party. This might seem to support the will theory. In practice however, it might be argued, these defences are not treated as *evidence* of lack of will or consent. Instead they are taken as *criteria* of nonliability. If the doctrines or rules are satisfied, then a defence is made out. If they are not then the defence fails. In neither case is there a subsequent inquiry into the presence or absence of will. H.L.A. Hart makes the point so:

---

[38] We will see a second example of this fallacious move when we return to the consent theory of contract in the next chapter.

[39] See Chapter One

> ... the positive looking doctrine "consent must be true, full and free" ... suggests that there are certain psychological elements required by the law as necessary conditions of contract and that the defences are merely admitted as negative *evidence* of these. But the defence, e.g., that B entered into a contract with A as a result of the undue influence exerted upon him by A, is not evidence of the absence of a factor called 'true consent' but one of the multiple criteria for the use of the phrase 'no true consent'.[40]

Hart's point connects nicely, it seems to me, with a larger issue here. I initially raised the 'evidence' objection in the context of a discussion of the need for expression of will. The objection was a way of reducing the significance of the need for expression of will. It seemed to be a way of conceding the need for expression while holding onto the core claim of the will theory - the idea that it was acts of will which really mattered. This way of talking conjures up a picture which will be familiar to many readers - a dualist picture of the mind and its relation to the world. The idea, very briefly, is that the mind is quite distinct from the body - it is a different type of thing and (on the most common account) is connected to the body only causally. According to the dualist, we have direct access to our own minds and mental states, but only indirect access to the minds and mental states of others. I know directly whether the mental state comprising 'true, full and free consent' obtains in *my* mind, but I can only infer from the observable phenomena - such as the 'behaviour' of your body - whether it obtains in yours.

All of the talk here, about the satisfaction of certain specified rules counting as the criteria for terms such as 'true consent', may remind us of a powerful response to this type of dualist picture which we have already touched upon in this chapter. Under the influence of Wittgenstein, a number of commentators rejected the dualist assumption that the ascription criteria for terms such as 'consent' and 'pain', were mental states, the presence or absence of which in others could only be judged by way of an epistemologically problematic inference from observable behaviour. It was not, the claim went, that my grimacing, or my saying 'O.K.', merely evidenced the presence of the hidden states the presence of which warranted the ascription of the terms 'pain' or 'consent'. Rather these external, observable phenomena were themselves the ascription criteria for these and similar terms.[41] Now if we find this Wittgensteinian objection persuasive, it seems to me, we should reject the claim that the will theory can be rescued by recognising that, after all, the external signs are merely evidence of the internal states which still, in fact, serve as the ascription criteria for the relevant terms. The Wittgensteinian objection shows that Hart is right about the legal practice, and necessarily so. In fact we cannot make sense of the idea that it is really the unobservable mental states that are doing the work. The evidential argument and the radically internalist will theory it seeks to defend, has the picture that we employ non-public criteria in discourse. But the private language argument and the attack upon dualism which motivates it, suggests that it cannot really be this way.

---

[40] HLA Hart 'The Ascription of Responsibility and Rights' (1948-1949) 49 *Proceedings of the Aristotelian Society* 171-194, 177

With this chapter I began a re-examination of some of the theories of contract introduced in Chapter Two above. I hope to have accomplished two things.

---

[41] The earliest statements of this Wittgensteinian rejection of dualism were provided by the 'logical behaviourists'.

First, I hope to have shown some of the potential of the analysis of normative theory offered in this study by turning that analysis to a difficulty posed by instrumental versions of will theory. Such theories may seem to be objectionably (normatively) externalist. Careful attention to the distinction between the criteria of concept individuation and the explanation for the selection of that criteria, however, shows this conclusion to be too quick. The status of a theory of contract as normatively internalist or externalist will depend upon the account of concept individuation offered by that theory. Where the theory relies upon criteria which are internalist, the theory will be properly regarded as internalist. This conclusion is not threatened by the fact that a full account of the theory, which might be expected, for instance, to include an explanation of why the theory has the criteria of concept individuation it has, requires regard to externalist consideration. Given this, the tentative conclusion that only 'intrinsic' or 'noninstrumental' version of will theory can respect that theories respect for 'mere acts of will', may have to be revised. More significantly, however, the conclusion should make us treat with caution the more general conclusion that all instrumental theories of contract and law should be rejected. For reasons given in the previous chapters, we may often be unable to appeal directly to those considerations which we value nonderivatively in our determinations of the application of normative concepts. In such circumstances some mediating system may be required to allow such determinations here and now. It may be, given the relation between procedural and substantive concerns, that such an endeavour will count as instrumental by the likes of, for instance, Ernest Weinrib. But, on the account of concept individuation offered in this study, that is not to threaten the possibility of an autonomous conception of law and contract. Such procedural systems can be internalist and content-independent despite their motivation by substantive concerns. The general claim here, again, is that the study shows the possibility of what we might call an *autonomous instrumental* conception of law and contract.

Second, the chapter examined the grounds for the almost universal rejection of what I called pure will theory. This consensus rests upon the objection that, contrary to will theory, contract inevitably requires resort beyond 'mere acts of will', since contract inevitably requires the external manifestation of such acts. I hope to have shown how the analysis offered in the study helps to identify a fallacy in the conclusion which is drawn from this apparently uncontroversial objection to pure will theory. Commentators such as Atiyah, I argued, fail to appreciate the distinction between what we may call for moment *epistemological* internalism and externalism on the one hand, and *normative* internalism and externalism on the other. The arguments which lie, albeit typically unarticulated, behind the almost universal rejection of pure will theory go to show not the impossibility of a normatively internalist theory of contract, but instead the impossibility of an epistemologically internalist theory of contract. Though their arguments entitle them only to the epistemological conclusion, however, commentators claim the second. This last move involves an objectionable equivocation between epistemological and normative internalism and externalism.

Making clear just what does and does not follow from the weaknesses of will theory has a further consequence for this study. At the beginning of this chapter I hoped to have shown not only that internalist content-independent theories of contract were possible, but that they were the most plausible of the two contract theory types. A proper account of contract, I suggested, would rely upon relational properties which were procedural in character. This discussion of will theory allows us to refine the requirements for such properties a little further. They will need to be epistemologically externalist in a way that the internal mental states of pure will theory were not. Contract is a public phenomenon. At least part of its function is to allow planning and co-ordination, and these functions will be served only if contract relies upon criteria which are publicly accessible. A similar conclusion follows from the appeals to the private language argument. That argument shows that the application criteria for language cannot be epistemologically internalist - they must be publicly accessible. Contract is a linguistic endeavour. The conclusions for language which follow from the private language argument constrain the form of a plausible conception of contract.

We can take these remarks further. I have alluded to the connection between contract and substantive concerns to do with planning and co-ordination. The significance of these remarks may by now be familiar. These substantive concerns place constraints upon the form of contract. Contract must rely upon criteria of a certain sort if these functions are to be served. Again the relation between substantive and procedural concerns is important. I have said that these functions require that contract rely upon epistemologically externalist criteria, and have been concerned to argue that it does not follow from this conclusion that contract must be normatively externalist. We can I think make this last point in stronger terms. Where the point of an activity is co-ordination, what matters is that some one of the options available to actors is rendered salient.[42] As I remarked earlier, a full treatment of the significance of the role of contract in facilitating co-ordination would take us too far astray. The following will suffice for our present purposes. Where competing concepts of justice in exchange are likely to lead agents to different assessments of what counts as the salient option in determinations of the extent and scope of contractual obligation, we have reason to appeal to some alternative method of settling salience. Procedural systems may be thought to provide such an alternative. On the account of concept individuation offered in this study, salience is a *formal* characteristic, bestowed upon contractual relationships by agents themselves by actions in accord with procedural systems. Such an account offers a system of contract better able to serve the co-ordinative function which seems to be at least part of the point of contract. The circumstances in which agents must rely upon a coincidence in judgement as to matters of substance is reduced. In a world in which agents disagree on concepts of justice and their proper application - disagree, to put the point in the language of this study, on external standards of justice and their bearing on particular cases or upon the content of particular agreements - we have cause to favour a normatively internalist content-independent account of contract.

---

[42] See here the works cited at footnote 43 above.

Chapter Seven

Contract and Consent

Many of the issues addressed in this study are raised in striking fashion by consideration of the role of consent in contract. We will usefully highlight two such features.

First, the view that consent is central to contractual obligation is often assumed to be definitive of what we have called the liberal conception of contact. The requirement or stipulation that contractual obligation arises only where and on terms to which contracting parties have consented seems to reserve to contracting parties - rather than to states or communities - the determination of the norms which obtain in their particular contract, and so to flow directly from the priority given to the choices of contracting parties by the liberal conception. Hugh Collins makes the point so:

> The classical law emphasizes the importance of consent to an agreement out of fidelity to its concern for individual liberty. The best justification for compromising personal autonomy is found in the act of consent to an agreement which is in itself an exercise of the freedom granted out of respect for personal autonomy. Just as there is no invasion of a person's freedom when he deliberately chooses to attend a concert to hear the music, so too no disrespect to personal

> autonomy can be imputed to courts which attach responsibility to agreements.[1]

Here the preference for consent is treated as having primarily *normative* significance. Where what matters is *that* the parties have consented, and not what it is to which they have consented, and in particular not whether that to which they have consented is consistent with an external standard of justice or fairness in agreements, the concern for consent goes to the distinction between normative internalism and externalism. Collins has this normative context in mind when he goes on to criticise the idea that a full account of contract can be given by appeal to consent. Contemporary courts, he claims, are concerned not just to respect personal autonomy, but also to respect and foster 'concern for others', so that " ... a court may impose liability in the absence of either express or implied consent to an agreement because of the strength of the appeal to the principle encouraging concern for the interests of others."[2]

Here, then, the principal significance of consent is taken to be its bearing upon some distinction such as that between normative internalism and externalism. In the previous chapter I suggested that it was important to distinguish between this normative distinction and an epistemological distinction often referred to in similar terms. Many positions within contract theory can usefully be viewed in terms of a distinction between those views which rest obligation upon the internal mental states of agents as compared with those which find such foundations in external or public criteria. The influence of this epistemological distinction is evident in discussions of the role of consent in normative theory generally, and in contract theory in particular. In the general sphere, for instance, Joseph Raz addresses this epistemological issue when he argues for a definition of consent which, he writes, "... characterizes consent as a (purportedly) public action. Consenting in one's heart is not a performative consent but a psychological state akin to coming to terms with. The core use of 'consent' is its use in the performative sense."[3] In the more particular sphere of contract theory, Randy Barnett, presenting the most sustained and explicit defence of a consent theory of contract, is concerned to argue that such a theory avoids the epistemological internalism of will theory. The 'subjective component of will theory', he writes, prevents it meeting "the inescapable need for individuals in a society ... to rely upon an individual's behaviour that apparently manifests their assent to a transfer of entitlements."[4] The consent theory of contract, however, avoids this difficulty since consent is "a *manifestation* of an intention to alienate rights."[5] Here consent bears upon the epistemological rather than the normative distinction between internalism and externalism.

---

[1] Hugh Collins *The Law of Contract* (London; Wiedenfeld & Nicholson, 1986) 53. Collins presents the view in order to criticise it.

[2] Ibid. See here as well Peter Linzer 'Uncontracts: Context, Contorts, and the Relational Approach' [1988] *Annual Survey of American Law* 139-198, 142: "... consent is ... increasingly being seen as only one of a number of factors affecting contract like liability.... To the extent that there is any consent, it is usually attenuated, often little more than a willingness to be part of a society that recognises obligations toward others. This makes the legal obligations no more consent-based than ... tort obligations...."

Our consideration of contract and consent in this chapter will be organised around these two issues, and will, for the most part, be a discussion of Randy Barnett's consent theory of contract. As we have seen in earlier discussions of Barnett's article,[6] he maintains that contract theories are to be treated as tokens of one of three contract theory types: contract theories are either one-sided party-based, substance-based or process-based. Barnett argues that the first of these theory types is inadequate, and concludes that the tokens of that theory type - will theory and reliance theory - are to be rejected *because* they are tokens of that type. I argued in Chapter Three above that we should reject the first of these theory types altogether - there was, I suggested, no reason to suppose will and reliance theories to be one-sided party-based in Barnett's sense, and so no reason to reject those theories because of their status as such. More generally, there was no reason to follow Barnett's three part taxonomy of contract theories.

---

[3] Joseph Raz *The Morality of Freedom* (Clarendon; Oxford University Press, 1988) 81

[4] Randy E. Barnett 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 301

[5] Ibid 304

[6] See above Chapter Three.

I hope it will be clear enough, however, that I have little quarrel with Barnett's account of the two remaining theory types. As we have seen, Barnett defines a standards-based theory as a theory "which evaluates the substance of a contractual transaction to see if it conforms to a standard of evaluation that the theory specifies as primary."[7] Process-based theories, by contrast, "shift the focus of the inquiry from the ... substance of the parties agreement to the manner in which the parties reached their agreement. Such theories posit appropriate procedures for establishing enforceable obligations and then assess any given transaction to see if these procedures were followed."[8] Barnett's standards and process-based theory types, then, are substantially equivalent to our two theory types. Substance-based theories specify independent standards in light of which the content, or substance, of contracts is assessed in order to determine the existence and extent of contractual obligation. Process-based theories eschew inquiry into the content of contracts; provided a contract has satisfied the specified procedural requirement obligation will arise independently of its content. The inquiry is internal, into the form of the contract itself.

---

[7] Randy E. Barnett 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 277. See above Chapter Three.

[8] Ibid 287

Barnett, then, presents and defends a distinction analogous to that around which much of the discussion in this study is centred. We will see, as well, that there are other points of congruence between Barnett and the approach defended in this study. I will suggest, however, that Barnett undercuts the essential distinction between substantive and procedural approaches by resting his process-based theory too directly upon a controversial substantive moral theory. As a result, Barnett's consent-theory suffers from the same defect that, on Barnett's own account, led to the rejection of standards-based theories as a type. I will suggest that the most telling criticism Barnett brings to bear against substantive-theories is that which claims that such theories can never in fact specify the required standard in a way which allows it to do the job set for it. The obvious problem for such theories, Barnett writes, "is identifying and defending the appropriate standard by which enforceable commitments can be distinguished from those that should be unenforceable."[9] But Barnett apparently believes that he can specify the content of a rights-based moral theory, which content serves to determine the form of an appropriate theory of contract, without difficulty. The content of this rights theory, it seems, is taken to be non-substantive and non-controversial in a way which allows it to avoid the objection raised against its standards-based competitors. But we are, I think, given too little reason to believe that such a theory will be able to escape the difficulties which Barnett rightly takes to plague substantive alternatives.

We will usefully begin by setting out Barnett's argument in a little more detail in order to highlight our apparent agreements and disagreements. As between substance and process-based theories, Barnett gives at least qualified support to the latter.[10] According to Barnett, standard-based theories, as a type, face two problems. The first is that noted above, namely that of identifying and defending the appropriate standard. The second problem faced by standards-based theories, according to Barnett, is the fact that the maintenance of a state of affairs which respects any standard that is selected will require constant intervention and interference with holdings, and "[s]uch interferences are at least presumptively suspect."[11]

---

[9] Ibid 285

We will return to these two objections in a moment. Note for now that the first of them may, under certain construals at least, be taken to be a version of the objection to externalist content-dependent contract theories offered in this study. Determinations of the existence and scope of contractual obligation, I suggested, cannot depend upon substantive or external standards of justice in exchange, where such determinations must be made in circumstances where there just is not agreement upon what such standards are or upon their significance in particular cases. The point of turning Gallie against Kronman was to suggest that the essential contestedness of the concepts involved in such determinations militated toward internalist content-independent accounts of contract.

Barnett supposes that these two objections - that addressing the difficulty of *establishing* an appropriate standard and that addressing the difficulty of *maintaining* approved distributions - go to show standards-based contract theories to be implausible. He has already dismissed one-sided party-based theory types on the grounds set out and discussed in chapter three above. There remains, then, only process-based theories. Such theories, recall, "posit appropriate procedures for establishing enforceable obligations and then assess any given transaction to see if these procedures were followed", and are substantially equivalent to our internalist content-independent theory types. Barnett does not, however, give unqualified support to process-based theories. Such theories, he maintains, face two significant and related difficulties: Where they in focus *exclusively* upon the process which justifies contractual enforcement, process-based theories conceal, or cut themselves off from, the substantive values that must support any choice of process. The first result of this alienation from underlying substantive considerations is that "... when the adopted procedures inevitably give rise to problems of fit between means and end, a process-based theory that is divorced from ends cannot say why this has occurred or what is to be done about it...."[12] The second result is that such exclusively process-based theories cannot explain why certain *kinds* of contracts, such as those the Godfather issues and contracts for slavery, are not and should not be enforceable: "If ... agreements of these types are reached in conformity with all the "rules of the game," a theory that looks only to the rules of the game to decide issues of enforceability cannot say why such an otherwise "proper" agreement should be unenforceable."[13]

---

[10] Recall that in Chapter Three above I remarked that we would need to qualify our categorization of Barnett as an advocate of process-based theories. That qualification is provided over the next few pages.

[11] Randy E. Barnett 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 286

Again, these reservations about process-based theories seem consistent with the reservations about pure proceduralism which lay behind the dilemma presented in Chapter Five above. The dilemma showed, I suggested, that neither substantivism nor proceduralism could, on its own give a full account of contract. Each needed some of the resources of the other - pure substantivism does not tell us how to go on, how to make determinations in the face of disagreement over the proper application of normative concepts, while pure proceduralism does not allow us select appropriate procedures, to say why some procedures are better than others. This latter difficulty with pure proceduralism, which led us to acknowledge the significance of the substantive perspective, lies as well behind Barnett's two objections to process-based theories. Barnett too is anxious that, on their own, process-based theories threaten arbitrariness. Again, then, we seem to see a congruence between Barnett's account of contract and that offered in this study. Barnett too concludes that an adequate account of contract must take account of both substantive and procedural perspectives. He goes on to claim that his consent theory of contract does just this, writing that:

---

[12] Ibid 289-290
[13] Ibid

> The significant ... advantages of process-based theories suggest that the best approach to contractual obligation is one that preserves a procedural aspect to contract law, while recognising that such procedures are *dependent* for their ultimate justification on more fundamental, substantive principles of right that occasionally affect procedural analysis .... A consent theory of contract is such an approach.[14]

This study has claimed that the approach to contract, and to determinations of the scope of normative terms generally, which it defends is also such an approach. The account of concept individuation sketched above is one which grants 'determinative' power to procedural considerations, while acknowledging the importance of considerations of substance: it too is an approach which "preserves a procedural aspect to contract law while recognising that such procedures are dependent for their ultimate justification on substantive principles". Again, then, there is considerable congruence between Barnett's account of contract and that offered in this study.

---

[14] Ibid 291

There is, however, a crucial divergence between the two approaches, and this difference, I will argue, is one which allows the approach forwarded in this study to avoid a fatal objection to which Barnett's account is vulnerable. The feature of Barnett's account which ultimately leads to this difficulty is stated in the opening sentence of 'A Consent Theory of Contract' where Barnett asserts that "[W]e look to legal theory to tell us when the use of legal force is *morally* justified."[15] According to Barnett a valid legal obligation is a precondition of the legitimate use of force, and the validity of legal obligations is to be determined by reference to morality. He writes that:

> A moral obligation is something we ought to do or refrain from doing. A moral obligation that is not also a valid legal obligation can only be legitimately secured by voluntary means.... A moral obligation is only a legal obligation if it can be enforced by the use or threat of legal force. This added dimension of force requires moral justification. The principle task of legal theory, then, is to identify circumstances when legal enforcement is morally justified.[16]

Although he stresses that moral and legal obligations are not coextensive[17], as between the two Barnett grants priority to morality. Whether or not a legal directive creates an obligation depends upon whether or not that directive is consistent with a preferred moral theory. On Barnett's account this preferred moral theory is a rights or entitlements theory. The institution of contract law itself gives rise to a system of rights and entitlements, specifically with rights or entitlements to do with the transfer of entitlements.[18] But the institution of contract itself rests upon a more fundamental rights system. In order to determine whether people have the right they wish to transfer, or whether the right in question is one which is transferable or alienable or otherwise, we must appeal beyond contract itself to the underlying rights theory, so that "[i]n this respect, the explanation of the binding nature of contractual commitments is derived from more fundamental notions of entitlements and how they are acquired or transferred."[19]

---

[15] Ibid 269. Emphasis added.
[16] Ibid 296
[17] Ibid 296
[18] Ibid 292

Now Barnett sees the fact that his account of contract acknowledges the role of this underlying rights theory as a considerable advantage over the other contract theories he considers. A common theme in Barnett's criticism of those theories he opposes is the claim that they appeal to or rely upon 'animating or underlying principles' while denying that they are doing so. For each theory, there are hard cases which it must resolve by appeal to principles to which it officially denies a role in the determination of contractual status and which are typically inconsistent with the norms of contractual obligation it does officially posit. In order to explain why obligation turns upon manifested behaviour even where such behaviour is known to be inconsistent with an agents 'actual will', will theorists must look to some other principle such as reliance;[20] in order to explain why only *justifiable* reliance gives rise to contractual obligation, a reliance theory must appeal to principles of reasonableness "unrelated to reliance";[21] in order to explain what counts as an efficient exchange, economic theories must "depend on a (usually assumed) set of prior entitlements."[22] Barnett writes that:

> The many gaps in these articulated theories of contract are, in practice, most probably filled by our shared intuitions about fundamental individual rights. Making this conceptual

---

[19] Ibid

[20] "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that the party enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." *Smith* v *Hughes* (1871) LR 6 QB 597, per Blackburn J.

[21] Randy E. Barnett 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 275

[22] Ibid 293

> relationship explicit helps to clarify what continues to be a hazy understanding of contractual obligation.[23]

Insofar as this is simply to repeat the claim that a full or proper account of the institution of contract requires reference both to substantive and procedural considerations I again have little quarrel. But note that Barnett goes further than that when he asserts that the underlying theory is a moral theory and a rights theory to boot. We can begin to bring out why this feature of Barnett's account distinguishes it from that offered in this study by revisiting Barnett's objections to substance-based theories. Recall that Barnett offered two such objections - one remarked upon the difficulty of specifying the appropriate standard and the other upon the difficulties of maintaining a distribution identified as desirable by such a standard. I suggested that the first of these objections could be treated as equivalent to the reservations expressed about pure procedural theories in chapter above. As against substance-based theories as a type, however, Barnett appears to place more weight upon the second objection. Standards-based theories, he remarks, rely upon what Robert Nozick has called *patterned principles of distributive justice*. Barnett endorses Nozick's well known objection to such principles. Nozick writes that:

> [N]o ... patterned principle of justice can be continuously realised without continuous interference with people's lives. Any favoured pattern would be transformed into one unfavoured by the principle, by people ... exchanging goods and services with other people .... To maintain a pattern one must either continually interfere to stop people from transferring resources as they wish to, or continually (or periodically) interfere to take from some persons resources that others chose for some reason to transfer to them.[24]

Suppose, for instance, that our standard of justice in distribution tells us that everybody ought to have an equal share of some set of basic goods, that we can work out what an equal share consists in, and that at some time this distribution is in fact achieved. According to Nozick and Barnett, if people are free to exchange their allocations under this optimific distribution, non-egalitarian distributions will inevitably arise. Patterned conceptions of justice in distribution, then, must be prepared to prohibit certain exchanges, or to intervene to restore equal distributions, if they are to maintain the patterned distribution of which they approve.

---

[23] Ibid

[24] Robert Nozick *Anarchy, State, and Utopia* (Oxford; Basil Blackwell, 1974) 163

I do not, of course, wish to defend a patterned conception of justice in contract. I concur with Barnett's rejection of such approaches. But in relying upon this 'interference' objection to such approaches, Barnett commits himself to another, in my view, equally objectionable picture. The interference objection is powerful only if we suppose that people have a prior right not to be interfered with. The objection supposes the antecedent existence of rights or entitlements which makes interference objectionable. Nozick acknowledges this feature of the objection when he begins *Anarchy, State, and Utopia*, quite literally, from the premise that "[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights)."[25] Nozick goes on to specify these rights in a little more detail by reference to Locke. "[W]e shall begin", he writes "with individuals in something ... similar to Locke's state of nature ..."[26], where such individuals:

> ... are in "a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or dependency upon the will of any other man". The bounds of the law of nature require that "no one ought to harm another in his life, health, liberty, or possessions."[27]

---

[25] Ibid ix . Nozick 'quite literally' begins with this premise since it is the opening sentence of the preface to *Anarchy, State, and Utopia.*

[26] Ibid 9

[27] Ibid 10. Nozick quotes sections 4 and 6 respectively of Locke's *Second Treatise on Government* from John Locke *Two Treatises of Government* 2nd ed., ed. Peter Laslett (New York; Cambridge University Press, 1967).

Given *this* starting point it is of course hardly surprising that Nozick runs the interference objection - such interference with holdings is a violation of the moral theory which underlies his entire thesis and which contains as one of its central propositions the right not to be interfered with. The interference objection, then, proceeds from an antecedent moral theory with a certain content. The first point to make here is that this feature of the objection means that *it* will not do to select between non-rights based and right-based theories. It presumes a prior commitment to the latter. Barnett then cannot properly wheel this objection out to dismiss substance-based theories. It will only function once a rights theory, with a particular content, is in place. Relying on the objection at the point of selecting between rights and nonrights-based theories, is simply to beg the question against the nonrights-theorist.

Recall now Barnett's other objection to substance-based theories. As well as the interference objection, Barnett pointed out that all substance-based theories faced the problem of specifying the standard by which contractual obligation was to be determined. I suggested that this objection could usefully be regarded as a version of the objection to externalist content-dependent theories offered in this study. The further development of the remarks in the last two or three paragraphs consists of the claim that this 'establishment' objection can be levelled as readily against Barnett's underlying moral theory as it can against the standards upon which standards-based theories rely. Neither Barnett nor Nozick give us any reason to suppose that *their* favoured moral theory is to be preferred over substantivist alternatives. Nozick acknowledges as much, expressly declining to argue for the Lockeian laws of nature which he concedes to be crucial to his account: "The completely accurate statement of the moral background, including the precise statement of the moral theory and its underlying basis", he writes, "would require a full scale presentation and is a task for another time. (A lifetime?)"[28], and, he continues:

> That task is so crucial, the gap left without its accomplishment so yawning, that it is of only minor comfort to note that we are here following the respectable tradition of Locke, who does not provide anything remotely resembling a satisfactory explanation of the status and laws of nature in his *Second Treatise*.[29]

The problem can be made clearer by considering what a suitable alternative might look like. According to Barnett consent is "a manifestation of an intention to alienate rights".[30] Thomas Hobbes seems to have had a similar notion in mind, when he spoke of renouncing or transferring rights. Humans divest themselves of rights, according to Hobbes "by simply renouncing; when he cares not to whom the benefit redoundeth, or by transferring; when he intendeth the benefit therof to some certain person, or persons."[31] And, he writes:

> The way by which a man either simply Renounceth, or transferreth his Right, is a Declaration, or Signification, by some voluntary and sufficient signe .. that he doth so Renounce, or Transferre ... to him that accepteth it.[32]

This notion, which is central to Hobbes account of the origin of the State, is surrounded by terms which *appear* to be moral terms, and so may appear to rest upon an antecedent normative rights-theory. Nature, Hobbes maintains, "has made man *equal*."[33] In the the state of nature, "every man has a *right* to every thing."[34] The sign of transference must be a *voluntary* act.[35]

---

[28] Ibid 9

[29] Ibid

[30] Randy E. Barnett 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 304

[31] Thomas Hobbes *Leviathan* (1651) ed. CB Macpherson (Harmondsworth; Penguin Books, 1968) 191

[32] Ibid

[33] Ibid 183. Emphasis added

[34] Ibid 190

[35] Ibid 190

Humans are in some sense subject to *laws of nature.*[36] At first blush, all of might seem to make Hobbes a natural lawyer of some description. Hobbes might seem to suppose that consent is effective because of a background which is ultimately and thoroughly moral and normative. But this would I think be to misunderstand Hobbes. The key to Hobbes is to see that, for Hobbes at any rate, these terms are *not* moral. The equality which Hobbes maintains obtains between humans in the state of nature is not a moral equality. Rather it is an equality of strength and guile, and so vulnerability. In the state of nature none of us are, as a brute fact, safe from attack by our fellows. The right to everything humans enjoy in the state of nature is not a moral right. We have a right (actually a Hohfeldian liberty) to everything simply because there are no effective barriers or impediments to our pursuit of everything. It is not that we have a right in the sense of a claim which justice demands be honoured. For Hobbes, an act is voluntary provided just that it proceeds from the will of the actor. This is why Hobbes counts as quite voluntary even a coerced act. Though we are inclined to regard 'voluntariness' as a moral notion, it is not so for Hobbes. And nor are the 'laws of nature' moral laws. They are for Hobbes, natural laws in the sense in which the law of gravity is a natural law. They state natural predilections to which humans are subject in the same way we are subject to appetites and aversions. So Hobbes notion of consent does not rest upon a 'moral order'. The key to Hobbes, then is to see that none of these apparently moral terms are intended by him at any rate to have any moral or normative force, or to depend upon a prior moral or normative theory. Rather, they are intended at all times to refer to 'non-normative' facts about humans and their condition. What I want out of this is the idea that Hobbes shows us a positivist, a non-natural law, conception of consent. And this is what I want to contrast with Barnett.

---

[36] Ibid 189-217

These remarks connect with the different stress given by Barnett and this study in their respective accounts of the implausibility of substantivist or substance-based theories of contract. Barnett rejects patterned conceptions, but does so from a rights perspective. According to Barnett, what is wrong with patterned conceptions of justice is that they call for constant interference when really people have a moral right not to be interfered with. Where this rights-based perspective features *at the level of procedure*, our procedures will be vulnerable to the same objection levelled at substantive or standards-based theories. In order to avoid that objection, we must exclude substantivism from our procedures altogether. I have suggested how we might do that while still retaining the substantive input which avoids arbitrariness in Chapter Five above. We see here that we must also rely upon the difficulty of the derivation or establishment of patterns rather than their application. Barnett lists both difficulties, but seems to rely ultimately upon the application problem. This is significant since the application problem really gets off the ground only if we suppose we begin with a theory of rights in place. The real reason for rejecting substantivist theories of contract is the difficulty of establishing the appropriate standards. Just so long as contract must function within communities whose members do not agree upon the identity or significance of the standards by which contractual obligation is to be determined, we have reason to favour a procedural approach to contract. This objection, unlike the interference objection upon which Barnett relies, does not rely upon an antecedent moral theory. Rights are determined *by* procedure rather than determinative *of* procedure.

So far we have been concerned primarily with the normative dimension of the internalist/externalist distinction. As we have seen, Barnett's account raises this distinction's epistemological namesake when he seeks to distinguish his consent theory from the will theory of contract. Here again there is a significant congruence between Barnett and the account offered in this study. Barnett concludes, in effect, that contract must to rely upon epistemologically external criteria of obligation on grounds which at least overlap with those canvassed in the previous chapter. But here too we see the effect of Barnett's commitment to the centrality of moral theory to contract, and again we see how that commitment creates difficulties for his account. The epistemological issue comes up when Barnett seeks to distinguish between consent and will theories of contract. In his initial presentation of will theory, Barnett criticises that theory on the grounds that it fails to appreciate the need for external signs of intent. Will theory, he remarks, "relies on evidence inaccessible to the promisee, much less to third parties."[37] Consequently, there is:

> ... a tension between a will theory and the inescapable need of individuals in society and those trying to administer a coherent legal system to rely on appearances - to rely on an individual's behaviour that apparently manifests assent to a transfer of entitlements.[38]

Barnett maintains that his consent theory avoids this difficulty, since it defines consent as "a *manifestation* of an intention to alienate rights."[39] This move may seem to raise an issue identified in the previous chapter. Barnett may seem to be running some version of what was called there the 'evidence objection', roughly the idea that the attack upon epistemological internalism could be avoided by the expedient of allowing a place for external manifestations as *evidence* of internal mental states, but holding to the view that it was the latter which functioned as criteria for the purposes of determining meaning or obligation. Where consent depends for its normative force upon its propensity to manifest intention, as Barnett's definition seems to imply, it may seem that consent has a primarily evidential role. Barnett takes it to be an important virtue of the consent theory that it is able to accommodate both the 'subjective' and 'objective' elements of contract. A consent theory, he maintains, is genuinely interested in internal mental states, but since we do not have access to such states we must, he concludes, rely upon external manifestations. He is right about this as far as he goes, but his reluctance to embrace externalism completely - to allow that external behaviour is not just evidence of intent where the meaning of contractual language is still *really* determined by such internal states, but is itself the criteria by which the meaning of such language is to be determined - seems to leave Barnett open to the responses to the evidence objection we associated with Hart and Wittgenstein. Barnett's vulnerability here seems to be generated by his commitment to the centrality of a particular moral theory in contract. His reasons for embracing epistemological externalism as far as he does are primarily moral - a theory which rejected such externalism would defeat the purpose of the theory of rights which underlies his account of contract. Epistemologically externalist approaches to contract are to be favoured precisely because they respect and protect the rights and liberty interests of others.[40] Thinking that it is this moral reason which undermines epistemological internalism, however, leads Barnett to adopt a position which appears perilously close to the evidence objection.

---

[37] Randy E. Barnett 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 273

[38] Ibid 301

[39] Ibid 304

Barnett continues the last quoted passage so:

---

[40] Ibid 306

> In contrast to a will theory, a consent theory's recognition of the dependence of contractual obligation on a rights analysis is able to account for the normal objective-subjective relationship in contract law.[41]

There are a couple of preliminary points here. First, if the account of Hobbes given in the previous section is taken to be at all plausible, then Barnett speaks too generally when he implies that consent theories of their very nature recognise the importance of a rights-based under-pinning. Barnett is right that a consent theory requires some account to explain why an act of consent effectively confers rights. But he is wrong in supposing that this takes him to a rights-based moral theory.[42] The appeal to Hobbes suggests the form of non-rights-based consent theory. Second, the implication here that consent theory leads directly and inevitably to a deontological theory is surely too quick. It seems very likely that consequentialist reasoning militates toward giving great normative significance to acts which Barnett would count as consent. If this is so, Barnett will be mistaken in supposing that a consent theory implies or requires a rights theory. The point is just that consent theories need not be deontological. It is easy to imagine that the consequences of treating consent as, for instance, a pre-condition for legitimate alienation of property would be such as to lead consequentialists to grant it such status - to treat consent, that is, in much the same way recommended by rights-theorists. Some care needs to be taken then, with Barnett's apparent assumption that consent theory inevitably 'recognises the dependence of contractual obligation on a rights-analysis'.

---

[41] Ibid 301

[42] This feature of consent theories, whereby they require some extra account of the normative significance of consent has been appreciated in treatments of consent in general political and legal philosophy. Ultimately, consent theories must rely upon some more primitive account of the source and nature of the authority which makes their consentor's consent effective. John Finnis makes the point when he complains that consent theory "... tacitly assume[s] that the present authority of particular rulers must rest on some prior authority ... of the community itself, granted away to the ruler by transmission ... or the individual over himself, granted away by promise, or implied contract, or 'consent'. John Finnis *Natural Law and Natural Rights* (Oxford; Clarendon Press, 1980) 247

Further, when Barnett moves directly from the first to the second of the two passages just quoted, he makes, it seems to me, the same error I attributed to Atiyah in the last chapter - he moves directly from the observation that the *epistemological* internalism of pure will theory means that that theory is an inadequate account of contract, to the claim that an acceptable theory must be one with a particular moral under-pinning. Because will theory "relies on evidence inaccessible to the promisee, much less to third parties", writes Barnett, it contains a "subjective component [which] creates a tension between a will theory and the inescapable need of individuals in society and those trying to administer a coherent legal system to rely on appearances - to rely on an individual's behaviour that apparently manifests assent to a transfer of entitlements."[43] Here Barnett is concerned with the epistemological issue. But he continues the passage by writing that "[i]n contrast to a will theory, a consent theory's recognition of the dependence of contractual obligation on a rights analysis is able to account for the normal objective-subjective relationship in contract law."[44] The contrast identified here, however, is *not* generated by the *epistemological* externalism of consent theory, but instead by its alleged dependence upon a particular normative rights theory. Barnett moves from the epistemological to the normative distinction. He supposes that in stepping into the public realm in a way which cures the epistemological internalism of will theory, he steps directly into the moral realm. But the vice of epistemological internalism requires a move not to substantive moral theory, but to an epistemologically externalist theory. Barnett I think confuses the two senses of public and private identified in the previous chapter.

---

[43] Randy E. Barnett 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269-321, 301

[44] Ibid

Barnett's error here is a manifestation of the more general error I have attributed to him earlier in this chapter. Barnett's takes the task of legal theory in general, and his task in contract theory in particular, to be to provide an account of the moral justifications of legal institutions. Although Barnett argues that moral standards cannot such provide direct criteria for determinations of contractual obligation, he supposes that they are prevented from doing so by the truth of a particular rights-based moral theory. His own process-based theory of contract, then, derives directly from the content of a particular moral theory. Since it does so, it is vulnerable to the very objection which shows standards-based theories to be implausible - the principles of substantive morality do not provide appropriate standards by which to determine the scope of controversial normative concepts, since they are themselves controversial and contested. What rights people have is to be determined procedurally because we do not otherwise agree. Our best hope is that we can come up with a 'process-based' theory which will obtain the support of those we count as our fellows. Barnett's account here, then, is undercut since he ties his favoured process-based theory to tightly to a controversial substantive position. And he makes a similar error when he turns to the epistemological issue, supposing that the move to an epistemological externalism is itself a move to a substantive moral theory. Having argued against standards-based theories, Barnett himself ends up endorsing an account which requires access to a substantive moral theory of rights.

There is then, I think, a good deal to be said for Barnett's account of contract. He is I think right about the value of the distinction between substance and process-based theories, though wrong about the need for a third theory type. He is right as well in seeking an account which allows substantive input while granting determinative power to procedure, and in arguing that an adequate account of contract must rely upon epistemologically externalist criteria of obligation. Barnett fails to see however that in resting his favoured epistemologically externalist, process-based theory too directly upon a controversial moral theory he leaves himself vulnerable to the very argument that militates in favour of proceduralism at the outset.

Chapter Eight

Contract and Promise

From the earliest efforts of Anglo-American contract theorists to develop a general theory of contract law,[1] the idea that contract could usefully be understood in terms of the institution of promise has been influential. One of the principal early sources of the desired general theory was Pothier's *Treatise on Obligation*,[2] where he defined a contract as "an agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other to give some particular thing, or to do or abstain from doing some particular act."[3] A glance through contemporary legal materials and texts suggests that the influence of 'promise theory' on contract has scarcely waned. Fridman commences his Canadian contract text by writing that "[p]romises are fundamental to the idea of contract.... A contract consists of a promise ... given by one person in exchange for the promise ... made by another person"[4] The American Law Institute's *Restatement of Contract* (2d) defines a contract as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law recognises as a duty."[5]

---

[1] "By the middle of the nineteenth century, English and American Lawyers had belatedly come to recognise that a theory of contract had a place not only in political and moral philosophy, but in jurisprudence as well." M.D. Howe *Justice Oliver Wendell Holmes: The Proving Years* (Belknap Pres; Cambridge, Mass., 1963) 223. Prior to this recognition, we are told elsewhere, "[i]t is clear that there [was] no general theory of contracts to be found in the common law .... The reason ... is simple enough.... Our ancestors were familiar with debt and covenant and account and assumpsit, but in their legal reasoning their inquiry always was, 'Will debt lie? Or covenant? Or account? Or assumpsit?' We have, therefore, a theory of debt, a theory of covenant, of account, of assumpsit; but we have no theory of contracts except what has developed in very recent times ...." Harriman *The Law of Contracts*, para 645 (2nd ed. 1901)

[2] Pothier's *Treatise* was translated as early as 1806: Pothier *Treatise on Obligations* (trans. W.D. Evans). By 1822 an English judge felt able to say that Pothier's authority was "the highest that can be had, next to a decision of a Court of justice, in this country" (*Cox* v *Troy* (1822) 5 B & Ald 474, 480; 106 Eng Rep 1264, per Best J) and, as of 1887, according to Kekewich J, the definitions of contract to be found in contract texts, were all founded upon Pothier: *Foster* v *Wheeler* (1887) 36 Ch.D. 695, 698. See as well Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979) 351, 399-401

A remarkably heterogeneous group of legal theorists also agree that contract and promise are, at the very least, closely related.[6] It was the heterogeneity of this group, indeed, which prompted my earlier suggestion that 'the' promise theory of contract should be regarded as a cluster of related theories which held some version of the claim that contract could be usefully analysed in terms of promise. We can usefully regard the theories which comprise this strand as ranging along a continuum between our two contract theory types. In our earlier discussion I marked out this continuum by reference to Charles Fried's account of contract as promise,[7] which belongs at the internalist content-independent end of such a continuum, to Joseph Raz's analysis of promissory obligation[8] which appears to combine an externalist justification with internalist legal institutions, and to Patrick Atiyah[9] who argues that promises (and so contracts) are merely admissions or evidence of antecedent and independently grounded obligations. My aim in this chapter is to examine two of these strands of promise theory in more depth, applying the analysis of contractual obligation developed in this study. I begin at the internalist content-independent end of the cluster.

---

[3] Pothier *Treatise on Obligations* (trans. WB Evans) Part 1, c.1, art 1.

[4] GHL Fridman *The Law of Contract in Canada* (2nd ed.) (Carswell; Toronto, 1986) 1

[5] Restatement of Contract (2nd) para.1

[6] This heterogeneousnesss presumably explains Sheperd and Sher's assertion that "[i]n all of the many definitions or descriptions of contract found in judicial opinions or the writings of legal scholars there is agreement on a minimal requisite of promise." Harold Shepherd and Byron D Sher *Law in Society: An Introduction to Freedom of Contract* (Brooklyn: Foundation Press, 1960) 42. While this assertion may have been reasonably sound when it was made, we will see that it is far from accurate now. One of the principle manifestations of dissatisfaction with internalist contract theories has been widespread criticism of the promise theory of contract.

[7] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass, 1981)

1) Charles Fried: Contract as Promise

Charles Fried's *Contract as Promise* is a closely argued defence of the claim that "the promise principle ... is the moral basis of contract law."[10] Fried's defence has two parts. In the first he is concerned to say just what the promise principle is. In the second he attempts to show that much of the actual institution of contract can be derived from that principle, and that those aspects which cannot, do not falsify the general thesis that contract is promissory. My overall claim against Fried is that he makes much the same mistake I have attributed to Randy Barnett - although Fried recognises that a plausible theory of contract must be internalist and content-independent, the theory he actually provides relies too directly upon a controversial substantive moral theory. Although Fried constructs an account of contract which seems to respond to many of the detailed criticisms of the liberal conception, in the end that account begs the question against the very views which such an account must address. This section is an attempt to cash out this claim with reference to both the general philosophical strategy and the detailed institutional responses of *Contract as Promise.*

---

[8] See in particular Raz's 'Promises and Obligations' in *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford; Clarendon Press, 1979) 210-228, and 'Voluntary Obligations and Normative Powers II' (1972) Supp. Vol. 46 *Proceedings of the Aristotelian Society* 79-101. The latter paper is a response to Neil MacCormick's 'Voluntary Obligations and Normative Powers I' in the same volume at 59-78.

[9] See especially his *Promises, Morals, and the Law* (Clarendon; Oxford, 1981).

[10] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass., 1981)

Fried's general theory of promise theory is basically Kantian. He begins from the idea that people, and *a fortiori*, their choices, are intrinsically valuable. Their value flows from their status as moral agents and as the choices of moral agents. To fail to respect the status of persons and their choices is to act wrongly.[11] We have seen how this starting point leads quite directly to what we have called the liberal conception of contract. One way to respect the 'special status of moral personalities' is to hold them bound only to those obligations they have chosen. Fried maintains that the will theory of contract recognises the power of individual choice to generate obligation. That theory, he writes, "sees contractual obligation as essentially self imposed [and] is a fair implication of liberal individualism."[12] When Fried describes his project as a rescue of the will theory of contract from its contemporary detractors, then, he means to indicate that his project is to rescue that theory of contract which gives priority to human will and choice, imposing contractual obligation only consistently with such choice.

According to Fried, the status of persons as rational planners - as 'freely choosing, rationally valuing, specially efficacious' entities - places them in a relationship with things in the world whereby those things are potential tools for the realisation of agents' plans and projects. For the most part this relationship is unproblematic. It is at least potentially so, however, in the case of an agent's relationships with other people. These others also enjoy status as rational planners. To treat *them* as mere tools or instruments is to deny the importance of the status the possession of which marks *us* as moral agents. In treating others as 'mere means rather than as ends-in-themselves', we undercut the characteristic upon which our own moral status depends. But if we simply *cannot* enter into relations with others whereby they serve our purposes, our own scope for choice would be drastically reduced. This too would be to limit our potential as 'specially efficacious entities'. To maximise the possible ways for us to realise our potential as agents, then, we must find some way to enter into cooperative relations with others without denying the importance of status as rational-planners. If individuals can serve each other's purposes consistently with respect for autonomy, the scope for human choice can be greatly expanded.[13]

---

[11] "... the things which are wrong, are precisely those forms of personal interaction which deny to our victim the status of a freely choosing, rationally valuing, specially efficacious person, the special status of moral personality." Charles Fried *Right and Wrong* (Harvard University Press; Cambridge, Mass, 1978) 28-29.

[12] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass., 1981) 2

Fried, then, wants to identify a form of willing which is able to give rise to obligation while respecting personal autonomy. He begins by considering what we may call pure willing. It is part of the essence of pure will that it is alterable. Though I convey an unconditional present intention to do something in the future, it is part of the nature of will that I may change my mind. Irrespective of its content then, an act of pure will will not constrain future will. We need something more than pure will. The next step is to add 'harm' to pure will. If I state a present intention and you rely upon it so that you will be harmed if I change my mind, perhaps I have an obligation not to do so, or an obligation to compensate you if you are harmed: "My statement is like a pit I have dug in the road, into which you fall. I have harmed you and should make you whole."[14] We might turn, that is, to some form of reliance theory. But this is to beg the question. Suppose it was always taken for granted that pure will left open the possibility that speakers might change their minds. *Now* a mere statement of will would not 'dig a pit in the road'. It would not lay a trap for those in my audience, since, knowing of the intrinsically alterable state of will, they would not rely upon such statements to their detriment. Reliance theory, then, *begins with* forms of will that are taken to 'bind future will'. They cannot explain how will *generates* obligation by appeal to harm or reliance, since such harm or reliance seems to suppose the explicandum: "The invocation of benefit and reliance", writes Fried, "are attempts to explain the force of a promise in terms of two of its most usual effects, but the attempts fail because these efforts depend on the prior assumption of the force of the commitment."[15]

---

[13] Ibid 8

[14] Ibid 10

Fried argues that what we must add to pure will is a certain kind of convention. The idea here seems to be that the difficulty identified with reliance and reasonable expectations theory is quite general: *any* plausible account of promise will be 'boot-strapping' in the sense that it must begin with an antecedent mechanism of obligation. Fried supposes that we must embrace this fact and find a boot-strapping argument which is not objectionable. He suggests that a conventional account of promise is such an argument. We are to recognise the existence of a convention of promising against the background of which individual promises create obligations. According to Fried, we cannot explain the binding force of particular promises independently of an explanation of the institution or practice of promising - to answer the question 'why should this or that particular promise be kept?', we must first answer the more general institutional question 'why have an institution of promising at all?'. Fried's account of promise, then, depends upon the now familiar distinction between justifications or explanations for conventions or practices or institutions on the one hand, and for particular moves within such conventions, practices, or institutions on the other.[16]

---

[15] Ibid 11-12

Fried thinks that he can provide an answer to the more general institutional question. People will serve each other freely, so as to maximise the freedom of all consistently with respect for the autonomy of all when they can *trust* one another to do as they have said: "When my confidence in your assistance derives from my conviction that you will do what is right (not just what is prudent), then I trust you, and trust becomes a powerful tool for working our mutual wills in the world."[17] According to Fried, the *practice* of promising gives trust its sharpest and most palpable form. We need trust if we are to maximise the scope for realisation of our status as rational planners and the best or perhaps the only way to have trust is to have a practice of promising. Promising, then, is "a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise"[18] and the institution of promise is to be justified by its ability to further the realisation of our status as 'freely choosing, rationally valuing, specially efficacious entities'.

So the justification for the *practice* of promising is at least partially instrumental - we have the practice because it furthers something we value intrinsically, namely the maximisation of our status as rational planners in a world we share with others of a similar status. It might seem, then, that the binding status of particular promises would always require to be justified by reference to this intrinsic value - the instrumental value of the practice of promising might seem to vulnerable, as we have seen all instrumental justifications to be, to a more direct appeal to the value toward which they are instruments. But it is one of the rules of the institution of promising - indeed it is the central rule - that the moral force of individual promises is *not* to be assessed in this manner. Promises have independent moral force and create obligations regardless of their content and regardless of how that content stands to some external value or standard. So particular promises are not binding because they further the value of human moral efficacy, and so are binding even where, on the facts of a particular case, it seems that they do not. The practice of promising is to be justified and explained by its tendency to militate toward this end, but particular promises depend for their force simply upon the fact that they are moves *within* an institution of promising of a certain form.

---

[16] The *locus classicus* of this distinction is John Rawls' 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3

[17] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass., 1981) 8

[18] Ibid 17

There are, I think, a number of difficulties for this general account of promising. For our purposes, it will do to concentrate on one, in which the general flaw I have attributed to Fried is especially clear. Fried claims that promises bind because they invoke an institution founded upon trust. He supposes that from this it follows that if I say "I promise to pay you $10.00 tomorrow" then I am bound to "simply do as I have promised."[19] But this is too quick. All that follows from the promise principle, as Fried presents it, is that others can trust that I will abide by the rules of the institution or convention of promise, *whatever they happen to be*. The principle tells us nothing about the rules of the convention itself. In particular, it is not clear why a community might not have a convention of promising, supported by the trust-based promise principle, whose rules were such that when I say "I promise to pay you $10.00 tomorrow" promisees are entitled to trust that I will not revoke the promise "provided that they have relied upon it", or "provided that they have furnished consideration" or "unless general utility would be furthered by revocation." The bare promise principle is consistent with any of these results and, no doubt, with many more besides. Hence the promise principle, as Fried presents it, is consistent with the theories of promise he opposes. Even allowing that the promise principle is founded upon a convention of trust, as Fried maintains, it does not tell us just what it is that others can trust we will do. That will be determined by looking to the rules of the particular convention, and Fried's promise principle itself does not tell us what those rules will be.

---

[19] Ibid 19

Fried of course denies this last claim. He thinks the promise principle *does* tell us what the rules of the convention of promising will be. Fried's convention of promise is one which gives no place to reliance or consideration or utility. But this follows not from the trust-based convention of promise itself, but instead from a fundamental moral principle for which Fried does not argue. Fried rejects the alternative accounts of what follows from promise, since he takes them to be incompatible with the deontological theory from which his account proceeds. The idea here is that only given Fried's content, will the promise principle respect the Kantian conception of autonomy upon which Fried's theory rests. I hope the preceding discussion will have shown why this direct appeal to moral theory at the level of legal institution is illegitimate: we have legal institutions in order to allow cooperation in the face of disagreements about substantive moral and political issues. Those institutions themselves, then, cannot rely upon direct appeal to particular substantive positions. To the extent that they do so, they are vulnerable to the very considerations which justify their existence.

We can take this point further. Even putting the legitimacy of Fried's direct appeal to substantive moral theory aside for a moment, it is not clear that a reliance or bargain theory *is* incompatible with Fried's fundamental moral principle. It is not clear, that is, that the Kantian injunction to respect the choices of individuals does rule out, for instance, a reliance based theory of promise. Fried maintains that to allocate obligation on a reliance basis is to fail to respect the autonomous choice a person makes when they invoke the institution of promise. We release them from an obligation they have chosen in their capacity as 'specially efficacious entities' and so fail to respect them as such entities. But this *assumes* rather than *supports* an institution of promise of a certain form. Given an institution such as Fried's it may be true that a choice to promise is a choice to accept a non-reliance based obligation. Failing such an institution, we might equally respect a person's capacity for choice by respecting their most recent choice rather then one they have recanted in the exercise of that unique capacity.[20] What *counts* as respecting someone's choice will depend upon the rules of the institution they have chosen to invoke.

---

[20] " ... the liberal theorist may object that change of mind should not be a permissible defence ... because it would show disrespect for contracting parties by not taking their initial choices seriously. ... But [t]here seems no compelling reason why respect for another's autonomy requires us to accord conclusive weight to a prior choice rather than a present choice." P S Atiyah *Essays on Contract* (Oxford; Clarendon press, 1986) 126. Anthony Kronman makes a similar point when he writes in his review of Fried's book that "[Fried's] invocation of the Kantian injunction against using other persons as means for promoting our own welfare adds little to Fried's argument. Is it clear that I use another person, in a way inconsistent with his moral status, by failing to keep a promise on which he has not relied? Or is he using *me* in an impermissible fashion if he insists that I have a duty to keep my promise, instead of recognising that under the circumstances he owes me a 'duty of release'?" 'A New Defender for the Will Theory' (1981) 91 *Yale Law Journal* 405-423, 412

My claim, then, is that right at the outset Fried begs the question against the views he opposes, precisely by appealing directly to the content of a controversial moral theory. Though he appreciates the need for a procedural theory of contract, he fails to see that the advantages of such a procedural system will only be attained if a clear break is maintained between procedural and substantive considerations.

The second part of Fried's defence of the promise theory of contract is an attempt to show how the institution of contract law can be understood as flowing from the promise principle. The fact that contracts are promises, according to Fried, explains and justifies much of the actual institution of contract while also allowing us to identify those features which are to be rejected. The remainder of this section is an examination of some of the major themes of this second part of Fried's defence, with an eye to showing how there too Fried begs the question against his opponents by relying too directly upon his underlying moral theory.

We can begin with Fried's treatment of the doctrine of consideration. As we have seen, many have thought that this doctrine - the rule that *gratuitous* promises are unenforceable in contract - poses the most telling descriptive challenge for the promise theory of contract. If it is *promise* which founds contractual obligation, the argument from consideration goes, then it should not matter whether the promise has been purchased. Since it does matter, it seems (per bargain theory) that it is the purchase or (per reliance theory) the harm which results from the promisee's loss which is important. Not surprisingly, then, Fried rejects the doctrine of consideration. The central claim in this rejection is that the doctrine of consideration is internally inconsistent and so does not pose a threat to promise theory after all. The idea here is that the doctrine is a part of the liberal conception of contract - it is a part of the conception of contract which "affirms the liberal principle that the free arrangements of rational persons should be respected."[21] But, insofar as it limits the class of enforceable arrangements to bargains, the content of the doctrine is inconsistent with this principle. Hence, Fried concludes, "the standard doctrine of consideration ... does not pose a challenge to my conception of contract law as rooted in promise, for the simple reason that that doctrine is too internally inconsistent to pose a challenge at all."[22]

But there seems to be a serious problem with this inconsistency argument. The problem is that the allegation of inconsistency is effective only to the extent that the doctrine of consideration *is* attached directly to a liberal principle such as Fried states. Fried's principal objection to the doctrine of consideration assumes that that doctrine flows from and maintains commitment to the liberal principle from which promise theory proceeds. If this were true, of course, it would not be surprising that *qua* critique of promise theory the doctrine at the very least flirted with inconsistency. But as we saw in our initial sketch of bargain theory some accounts of the consideration requirement do *not* proceed from or maintain commitment to Fried's liberal principle. I suggested, for instance, that one might construct a *fairness*-based rationale of consideration, where the general idea would be that the doctrine aims to prevent those who have received value for a promise reneging, just because where they do so they benefit unfairly at the promisee's expense to the value of that consideration. Where there is no consideration, no 'unjust enrichment' results from the breach, and so there is no unfairness. Fried, of course, finds this rationale completely unacceptable.[23] The point for now, however, is that if some such a fairness-based account of consideration could be sustained, it would completely avoid Fried's inconsistency argument. Again Fried's argument simply assumes the view of contract he favours. But this is of little value. It is not news that the liberal conception is troubled by the doctrine of consideration, so it is not news that made a part of a single rationale, the conception and the doctrine threaten inconsistency. The question is as to the significance of this fact for the liberal conception. Fried avoids this question by simply asserting the primacy of the deontological promise principle.

---

[21] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass., 1981) 35

[22] Ibid

A similar sort of difficulty also dogs what is perhaps the most striking feature of Fried's version of the will theory of contract - his concession that the promise principle is unable to explain many remedies which have traditionally been thought of as contractual, and which more naive contractual liberals have purported to generate from will theory. The classic examples here are the doctrines of mistake, frustration and impossibility. The difficulty, of course, is that these doctrines seem to come into play precisely when some event occurs or some fact exists about which the parties have had no intention or will: They agree upon the sale and purchase of a quantity of cotton arriving in England "ex *Peerless* from Bombay", without appreciating that there are two ships of that name on the relevant route and that they have in mind different ships.[24] The plaintiff agrees to let a room to the defendant for the day of Edward VII's coronation. Neither party contemplates the possibility that the king will fall ill, and the coronation will be postponed.[25] The parties rent and hire a music hall for a particular night making no provision for the destruction of the hall by fire.[26]

---

[23] Ibid 29

[24] *Raffles* v *Wichelhaus* [1864] 2 H & C 906; 159 ER 375

Such cases pose a dilemma for defenders of classical will theory. Since they insist that *all* of the rights and duties which hold between contractual parties are to be explained by reference to the parties' wills, they have to say either there are no rights in such cases, or find some aspect of will upon which they could hang a remedy. The first strategy is manifest in the 'absolute contracts' rule - the idea that failure to make express provision for some event indicates that the parties *intend* there to be no remedy for that event: "... when the party of his own contract creates a duty ..., he is bound to make it good ... notwithstanding any accident by inevitable necessity, because we might have provided against it by his contract."[27] The first strategy, then, amounts to allowing the burden of unforeseen events to fall where they may. But, complains Fried, "this harsh, silly result is a stock example for critics of just where the will, or liberal, or promissory theory leads."[28] The second strategy is manifest in the fictions of 'presumed intent' and the 'objective theory of interpretation'. According to the former, even though the parties have failed to make explicit provision for some event, they may be presumed to have had the appropriate intent upon which a will or intent theory can then attach liability.[29] Fried concedes a proper role to such presumptions in determinations of meaning: "So when a person refers to all the even numbers between 10 and 1000, he intends to refer also to the number 946, though the number may not figure in some explicit list in his head."[30] But, complains Fried, the classicists must take the presumed intent doctrine much further than this general and perfectly sound principle from the philosophy of language if they are to explain all the cases in which the courts find intent in the face of contractual silence. And in the extreme cases at least, he suggests, the courts are not simply determining the parties' actual but unexpressed intentions at all, but are instead *imputing* such terms to them as, for instance, substantive principles of fairness require. As we move further from actual intention, the presumed intention strategy tends to merge into the approach of appealing directly to substantive standards to solve the problems caused by failures in the agreement.[31] In practice then, claims Fried, resort to the doctrine of presumed intent amounts to a concession to what we have called normative externalism - the existence and content of contractual obligation is determined by appeal to external standards of fairness in exchange relations rather than by appeal to the will or intent of the parties. The result is much the same, he maintains, where classicists appeal to the fiction of the objective theory of interpretation. The idea here is that when what the parties *seem* to have said leaves a lacuna or creates a conflict in the

---

[25] The coronation was scheduled for June 26 1902, but was postponed until August 9 on June 24 when the king became ill. Remarkably the incident gave rise to at least twoclassic cases. In *Krell* v *Henry* [1903] 2 KB 740 the contract was concluded before the cancellation and was held frustrated. In *Griffith* v *Brymer* (1903) 19 TLR 434 the contract was concluded after the cancellation of the coronation and relief was premised upon mistake.

[26] *Taylor* v *Caldwell* (1863) 3 B&S 826; 122 ER 309

[27] *Paradine* v *Jane* (1647) Aleyn 26; 82 ER 897 (lessee liable for rent arrears even though evicted from tenancy by alien enemy). The leading American case is *Stees* v *Leonard* 20 Minn 494, 530 (1874) Young J.

[28] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass., 1981) 64

[29] So in *Taylor* v *Caldwell* (1863) 3 B&S 826; 122 ER 309, where, recall, a contract whereby the plaintiff obtained the use of the defendant's music hall for a certain period was

---

frustrated by the destruction of the hall in a fire, Blackburn J explained why the music hall owner was not liable in these terms: "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it would not be fulfilled unless when the time for the fulfilment of the contract arrived some specified thing continued to exist ... there, in the absence of any express or implied warranty that the thing shall exist, the contract is ... to be construed as ... subject to an implied condition that the parties shall be excused in case ... performance becomes impossible from the perishing of the thing without default of the contractor."

[30] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass., 1981) 60

[31] Ibid 61

contract, the court might repair the problem by asking what somebody *else*, typically the reasonable person, would have said had they been in the parties' position. The contract between the actual parties is then interpreted as though it *had* been written by these reasonable persons in the parties' shoes. But, complains Fried, though "this may be a reasonable resolution in some cases, ... it palpably involves imposing an external standard on the parties."[32]

Fried wants a response to these cases which allows him to avoid the harsh and silly result of denying remedies altogether, while at the same time avoiding the inconsistency which results from attempting to provide remedies from within will theory. His solution is to argue that remedies should be provided from outside contract. The idea, then, is that will theory cannot generate doctrines such as mistake, impossibility, and frustration: "For one may ask", Fried writes, "what it would even mean to give effect to the 'will of the parties' in a case where the parties had no convergent will on the matter at hand."[33] But, Fried continues, where "[j]ustice ... requires relief and adjustment in cases of accidents in and around the contracting process" courts properly provide remedies by appeal to nonpromissory principles. There are, Fried maintains, inevitably 'gaps' to be found in contracts, created by the failure of parties of limited powers of foresight and drafting to provide for every possible occurrence which might effect their relationship. These gaps cannot be filled by appeal to the wills of the parties - they are gaps precisely because of the absence of such will. They must be filled, then, by appeal to what Fried calls the "residual general principles of law." The idea here seems to be that the law of contract supervenes upon the general body of law. Though contracts contain gaps, the general body of law does not. Occasionally then, where the parties fail to provide for some event, a case may fall through the mesh of contract, but it will be caught in the gapless weave of the general law. The claim that the general body of law is indeed a gapless weave is supported by an appeal to Ronald Dworkin. The by now familiar idea here is that the law consists not just of rules but also of principles. The fact that no legal *rule* provides a determinative answer to some case, does not indicate that there are no rights, or that judges must simply make up an answer. Rather judges are to find the answer that is there in the law by appeal to legal and moral principles which underwrite the legal rules. United under the umbrella of a coherence theory of law, the legal rules and the background moral and legal principles create a gapless weave, a 'seamless web', which provides a determinative and antecedent answer to every possible legal question.

---

[32] Ibid 61

[33] Ibid 63

In those cases, then, where the parties 'had no will at all' on a matter which must be resolved to determine their rights and duties, the courts must appeal beyond will, and so beyond promissory principles to "residual general principles of law." Fried offers three examples of such principles: the first two are traditional nonpromissory legal principles - in appropriate circumstance courts may properly appeal to the tort principle of compensation for harm done, or to the principle of restitution of benefits received. The third example seems to operate at a deeper level - perhaps at the level of Dworkin's moral principles; where there is no agreement (so promissory principles do not help) and no one in the relationship is at fault (so tort principles do not help) and no one has conferred a benefit (so restitutionary principles do not help), courts may appeal to a 'distinct' principle requiring the parties to share losses and gains. Since the parties to a contract are joined in a common enterprise which they freely choose to enter, they have an obligation to share unexpected benefits and burdens which result from an 'accident' in the course of that enterprise. There is a residual general principle of sharing; since the parties are after all the parties to a contract, albeit an imperfect one, they are covered by a principle that unexpected benefits and losses will be shared among them.[34]

It is worth noting here that Fried is conscious that his recognition of such a principle might be turned against him by communitarian critics of the liberal conception: does not our common membership in political, social, and cultural communities of itself mean that we are, in some relevant sense, not strangers to one another? Why is the principle of sharing triggered only by contractual relationships and not by these more general commonalities as well? We might see the *conclusion* that some such principle is so triggered in Hugh Collins' insistence that the modern law of contract demands respect not only for the virtues of individualism, but also for "a fair distribution of wealth, the avoidance of unjustifiable domination, and a duty to respect the interests of others."[35] But Fried rejects this extension of the principle of sharing. The parties to a contract, he writes:

> ... stand closer than those who are merely members of the same political community. ... Just as we do not say that *C* must come in to share those losses [resulting from the accident in the course of *A* and *B* 's enterprise], so we do not say that *A* and *B* must share losses that are wholly outside the scope of their enterprise.[36]

Fried's resort to these residual general principles of law has some obvious advantages. He is able to avoid saddling will theory with many embarrassing cases without embracing the unpalatable 'absolute contracts' solution of denying remedies where cases seem to cry-out for them. In the end, however, it seems to me that this move too is unsatisfactory. One quick complaint, of course, is that the strategy leads Fried to defend an institution of contract that few practitioners or legal theorists would recognise. Fried simply amputates many of the features of the institution of contract which have generated criticism of will theory. He does so, however, at the cost of drastically narrowing the scope of contract proper. Many of the issues which have traditionally troubled contract theorists, such as mistake, frustration, and impossibility, are now said to stand outside the promise principle, and so outside contract.[37] The promise principle explains all of contract, but 'all of contract' is not what we once thought it was. Many venerable contractual issues are now to be explained by other, non-promissory and so non-contractual, principles.[38]

---

[34] Ibid 72

[35] Hugh Collins *The Law of Contract* (Wiedenfeld & Nicholson; London, 1986) 15

[36] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass., 1981) 72

There is however a more serious difficulty. It can usefully be put so: We have seen that Fried is anxious to concede that the promise principle is not the sole determinate for the rights and duties of the parties to a contractual relationship.[39] He does insist, however, that the promise principle has priority over competing principles such as restitution: Restitutionary principles only come into play where there is a gap in the contractual relationship. These residual general principles of law supplement but do not supplant the promise principle. This ranking is crucial to Fried's conclusion that contract is promissory, even though under-pinned by a safety net of supplementary principles. But nothing in the promise principle itself guarantees Fried's ranking. According to Fried, a contract is binding because it is a promise, and promises are binding because they are moves in an institution founded upon trust. I have a moral obligation to perform my promise because I have given the other party reason to trust that I will do so. Suppose however, that the other party is not entitled to trust that I will perform 'if performance would violate another moral rule that outweighs or excludes the promise principle'. If our convention of promise contained such a rule, then *this* would be what people could trust I would do had I promised. There is nothing in Fried's promise principle *per se* which precludes the possibility that the convention of promise does contain some such provision, and that the promise principle is consequently subject to other overriding moral principle. So even given the validity of the promise principle, its primacy is not guaranteed. We need some further argument for that, and Fried provides no argument other than, again, a simple appeal to the deontological moral theory that underpins his account of contract. Fried takes the promise principle to be primary because he *begins* from a Kantian moral theory.

---

[37] Fried also appeals to nonpromissory principles to explain the appropriateness of restitutionary remedies in cases such as the famous *Hoffman* v *Red Owl Store* 26 Wis 2d 683, 133 NW 2d 267 (1965) (Ibid 24-26) and also to deal with some cases of unconscionability which he assimilates to mistake (Ibid 81).

[38] P S Atiyah raises this objection against Fried in his Review of *Contract as Promise*: (1981) *Harvard Law Review* 509-528, 516-517. The review is reprinted, with minor changes, as 'The Liberal Theory of Contract' in Atiyah's *Essays on Contract* (Oxford; Clarendon press, 1986) 121-149 where the objection is raised at 139-140.

[39] "Certainly nothing about the promise principle ... entails that all disputes between persons who have tried but failed to make a contract or who have broken a contract must be decided solely according to the principle" *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass., 1981) 27

I have suggested that many of of the moves in Fried's defence of promise theory *amount* to direct and so illegitimate appeals to substantive moral theory. It is perhaps worth simply saying here, that similar objections may be made to Fried's frequent *explicit* appeals to such substantive theory. These open appeals come at several stages of Fried's argument. Fried's account of duress provides an example. It might seem that the obvious line for Fried to take on duress is to say that a promise elicited by duress fails to generate obligation since the will of the putative promisor is somehow overborne or negated by the act of duress. A duressed promise, then, would not really be a promise by the lights of the institution of promise. But Fried eschews this straightforward line: *All* promises result from a choice between a less and a more desirable option. Duressed promises are not uniquely made under such conditions, and so cannot be identified by reference to that fact. What does mark duressed promises, according to Fried, is that they are induced by a breach of the promisee's rights: the doctrine of duress prevents obligation arising from contractual promises which are elicited by a threat to violate some right of the putative promisor. Fried, then, maintains that an account of duress must be under-pinned by a theory of rights - he goes, that is, for something like Kronman's liberty principle. As the reference to Kronman suggests, Fried's strategy invites opponents of promise theory to argue that rights allocations are themselves simply conventional assignments or distributions of power and property. Such an argument aims to show that duress is distributive, insofar as it relies upon a distributive allocation of rights. Fried response to this 'Kronmanian line' is to claim that while property rights may be conventional to *some* extent, they are not wholly so, since they, like the promise principle itself, rest upon the moral foundations provided by respect for individual autonomy: "[A] person's right to his own person and thus to his talents and efforts is a fundamental tenet of liberal individualism, not just a passing, contingent judgment designed to effect some particular economic or social scheme under particular circumstances."[40] Fried's response here, then, turns out to be a direct appeal to the moral theory which underlies his account of contract.

---

[40] Ibid 99

Fried's treatment of substantive unconscionability is another example of this direct appeal.[41] Substantive unconscionability arises where there has been genuine consent to the terms of a contract which impose an 'unconscionably onerous' burden on one of the parties. Fried argues that the law of contract should not be used to provide relief from such 'hard bargains'. Such a policy is inevitably arbitrary - those who bear the burden of relief channelled through contract are selected simply because *they* happen to contract with the poor or the unfortunate. The liberal conception does not refuse relief to these 'unfortunates', but it insists that that relief or redistribution is a task for the community as a whole: "Redistribution is not a burden to be borne in a random, ad hoc way by those who happen to cross path with persons poorer then themselves. ... Liberal democracies have chosen to effect redistribution (to assure a social minimum) by welfare benefits on the one hand and by general taxation based on an overall ability to pay on the other."[42] This preference is justified, according to Fried, since the randomness which marks the former strategy creates circumstances which "undermine our ability to plan and lives our lives as we choose."[43] Redistribution through contract, such as a doctrine of substantive unconscionability might provide, then, threatens to limit the exercise of the capacity for rational planning which the liberal conception values. The argument against substantive unconscionability turns out, again, to be an appeal to the liberal principle which underlies Fried's entire project.

These examples will suffice to illustrate the strategy: At a number of points in Fried's case for the promise theory of contract he appeals directly to an underlying moral theory of a particular content. This appeal is, I suggest, illegitimate. Inevitably it means that Fried's account begs the question against those who reject that underlying moral theory. These opponents might have been troubled, of course, had Fried been able to show that that underlying theory did indeed explain the body of contract doctrine. An important part of Fried's strategy was to show that the promise theory generated a descriptively accurate account of contract. But his attempt to execute this strategy is unconvincing. Fried simply declines to attempt to explain many of the more troublesome aspects of contract doctrine - relegating them to a realm of residual general principles whose *residuary* status is itself secured only by a question begging appeal to Kantian moral theory - while many of the explanations of doctrine he does provide, such as that for duress, are similarly question begging.

---

[41] Again, Fried takes *procedural* unconscionability, which arises due to a flaw in the process of contracting, to be a species of fraud, or mistake, or absence of good faith. Since there is no agreement in such cases, they fall outside the promissory principle. Ibid 81

[42] Ibid 106

[43] Ibid 106

2) Patrick Atiyah: Promises as Admissions

We have seen that Fried is concerned to argue that an adequate theory of promise is able to explain and justify the institution of contract law. In a book published in the same year as Fried's *Contract as Promise*, Patrick Atiyah presents an argument for a promissory account of contract which goes in precisely the opposite direction. According to Atiyah, a proper account of the institution of contract provides an explanation and justification for the practice of promise. While Fried draws conclusions about the proper form of the institution of contract law from a moral theory of promise, then, Atiyah claims that a proper understanding of the institution of contract compels acceptance of a certain view of promissory obligation. Hence, Atiyah concludes his study by remarking that theories of promise which do not take account of the demise of 'the belief in the freedom of contract' between the nineteenth century and the present are shown by that reason to be inadequate. Any theory, he writes, which:

> ... fails to take account of movements in opinion of this magnitude is in danger of ending up as an obsolete theory. Far from explaining the moral basis of promise in any absolute or eternal sense, such theories turn out to be firmly rooted in the ideology of nineteenth century western thought.[44]

We will see Atiyah does think that promise theorists have failed to notice the demise of the classical theory of contract, and have as a result failed to give a proper account of promise. Atiyah, then, identifies a discrepancy between promise theory and contract. It might seem that this would lead him to reject a promise theory of contractual obligation. Atiyah, however, appears not to contemplate this nonpromissory conclusion. Instead, as one commentator puts it, his book's "unspoken presupposition is that contractual obligations are promissory ones, and that contracts are promises."[45] Although this commentator is I think right about the absence of an express rebuttal of the nonpromissory conclusion, it is perhaps worth noting that it is only given some such presupposition about the promissory nature of contract that Atiyah's claim for the significance of contract theory for promise goes through: If contracting really *were* distinct from promise, there would be little reason to accept Atiyah's claim that his conclusions about the nature of contractual obligation were significant for the nature of promissory obligation. Atiyah, then, like Fried, supposes contractual and promissory obligation to be of a kind. They differ in that Fried thinks the kind is promissory where Atiyah thinks the kind is contractual.

---

[44] PS Atiyah *Promises, Morals, and the Law* (Oxford; Clarendon Press, 1981) 215

[45] Joseph Raz 'Book Review' (1982) 95 *Harvard Law Review* 916-938, 921

In the early parts of *Promises, Morals, and Law* Atiyah is concerned to clear the ground for his own 'contract-based' account of promise; he is concerned, that is, to mount a critique of alternative accounts of that practice. This critique too is predominantly contract-based: Atiyah takes 'natural law'[46] explanations of promise, for instance, to be equivalent to what we have called the pure will theory of contract, and rejects them on grounds substantially similar to those which led us to reject pure will theory in Chapter Six above. He concludes his treatment by writing that "[a]n uncommunicated promise is something which lawyers ... find difficult to regard as a possible source of liability" before asking rhetorically: "Is the position different in morals?"[47] Atiyah characterises the utilitarian account of promise in terms of reliance and expectations theories of contract: "it places most of its weight on the expectations created by promises and on the fact that people rely on them and would suffer harm as a result of so relying if promises were not kept."[48] From here, Atiyah wheels out a familiar 'contractual' response: utilitarianism, so understood, faces a 'logical impasse':

> *If* a promise is regarded as creating an obligation, and as therefore creating a reason for performance, then it becomes natural for the promisee to expect performance and even to rely upon it; but ... this is only true if we first make the assumption that the promise is binding. How do we get into this situation in the first place?[49]

---

[46] PS Atiyah *Promises, Morals, and the Law* (Oxford; Clarendon Press, 1981) 9-28

[47] Ibid 19. Atiyah also argues that the natural law account of promise is unable to explain the fact "that everyone accepts" that not all promises are binding. Again Atiyah illustrates and supports his claim by reference to contract doctrines including duress, mistake, and fraud. See ibid 22-28.

[48] Ibid 63

[49] Ibid 64. Atiyah also relies upon the objection, familiar from the philosophical tradition, that neither act nor rule utilitarianism can explain why a promise should be binding even where, *on the facts of a particular case*, greater utility would be generated if the promise were broken. See ibid 86.

When Atiyah turns to a collection of 'nonutilitarian' accounts of promise, he dismisses intuitionism and subjectivism out of hand: the former is based upon "a curiously faded, old fashioned" confidence that moral intuitions are sufficiently stable, comprehensive, and universal to provide answers to all contractual or promissory problems[50], while the latter is unable to explain promise - a promise turns out to be an expression of a certain sort of desire, but subjectivism "does not tell us why (in our sort of society) people commonly have this desire, nor whether it is ... a 'good thing' that they have this desire."[51] Atiyah is almost as short with the view that promise might be explained as a 'performative'. Here the idea is that the words 'I promise' are themselves properly regarded a kind of action - there is nothing beyond this action, such as reliance, which justifies promise. The action of promising just is itself an action which generates promissory obligation.[52] But, complains Atiyah, the performative theory must explain, and cannot, how and why the verbal form 'I promise' actually creates an obligation: "The performative theorist is insistent that the act creates an obligation simply because it is an obligation-creating sort of act. Put in this fashion, it is not obvious that the theory has much explanatory power. The difficulty ... is to see how one can create a moral obligation just by saying that one does so."[53]

Atiyah presents the 'practice theory' of promise as an attempt to meet this deficiency in the performative theory. Drawing on the seminal work of HLA Hart[54] and John Rawls,[55] the practice theory points to the need for some antecedent practice or procedure whereby the utterance or writing of or certain words or the performance certain speech-acts is sufficient to create an obligation. Such procedures, Hart argued, must be in place if an action is to count as a promise: "If no such procedures exist, promising would be logically impossible, just as saluting would be logically impossible if there were no accepted conventions specifying the gestures of formal recognition within a military group."[56] The obligation to perform a promise, then, derives from the performance of a certain action in the context of an antecedent conventional or institutional recognition of such actions as having a certain normative status or power. The institution of promise is an example of a power conferring institution. The rules of the institution make it possible to create obligation by the utterance of a certain form of words, just as the rules of cricket make it possible to score six runs by hitting the ball over the boundary on the full. One could not 'hit a six' if it were not that the rules of cricket defined that status and recognised a certain action as having that significance, and nor could one promise were it not that the rules of promise defined promissory obligation and recognised a certain action as creating such obligation.

---

[50] Ibid 88-93

[51] Ibid 98

[52] Atiyah presents Joseph Raz as defending a version of the performative theory. Ibid 102.

[53] Ibid 103

[54] HLA Hart *Definition and Theory in Jurisprudence* (Clarendon Press; Oxford, 1953); 'Legal and Moral Obligation' in *Essays in Moral Philosophy* ed. Melden (Seattle and London; 1958) 82-107, at 101-105; *The Concept of Law* (Oxford; Clarendon Press; 1961) 42-43

[55] John Rawls (1955) 64 *Philosophical Review* 3

Beginning to develop a theme which will mark his own account of promise, Atiyah maintains that the claim that promise-like obligation presupposes an antecedent institution is in most cases just false. In early contract law, he remarks, (evidencing again the priority of legal doctrine in his analysis) the obligation to repay borrowed money was based upon the fact that the borrower had received the lender's property, rather than on a promise to repay. Here we might imply a promise, but it would follow from rather than precede and ground the obligation. Similarly, an express promise may amount to an invitation to others to rely upon the fact that the promisee will act in a certain way. Where it does, all that is needed is an understanding that it is part of the nature of such invitations that they give rise to obligations. Atiyah illustrates the case by reference to the concept of a loan. The idea here is that it is just part of what a loan is that the borrower will return or repay what has been borrowed. We might imply a promise here, but we do not really need to: "So long as the concept of a loan is understood, an obligation to repay a loan is intelligible without recognizing the institution of promising."[57] The practice theory may be right, Atiyah remarks, in supposing that promise must be preceded by an understanding of the notion of obligation. Without that, an account of promise seems to fall into the logical impasse which does for reliance theory: "It is not sufficient for a person to complain that he has relied upon another ... in order to justify the imposition of an obligation on that other. ... For the complainant must be able to explain why he is entitled to rely on that other."[58] But generally, according to Atiyah, where promises involve trust or reliance those phenomena themselves allow us to explain the particular obligation, along the lines of the loans case, without resort to an antecedent institution of promise.

---

[56] HLA Hart 'Legal and Moral Obligation' in *Essays in Moral Philosophy* ed. Melden (Seattle and London; 1958) 101-105. See also Hart's *The Concept of Law* (Oxford; Clarendon Press; 1961) 42-43

There is, Atiyah suggests, one noteworthy exception here. Resort to an antecedent institution may be necessary to explain the obligation to keep promises which are what the law calls wholly executory - promises which have not been paid for or relied upon. "Promises of this kind cannot arise out of trust, or the rendering of benefits, for in these circumstances there is, by hypothesis, no trust and no benefit rendered. If it were not for the institution of promise, then, promises of this kind could not be made; whereas promises arising out of trust or benefits rendered could still arise without difficulty."[59] Here though, the implication is, the parties are in effect 'using' moral and legal ideas which are properly explained by reference to notions such as trust and fairness. The obligatoriness of executory promises arises because the parties resort to an artificial promise system, which is parasitic upon the real thing. We will return to Atiyah's treatment of mutual executory promises shortly.

---

[57] PS Atiyah *Promises, Morals, and the Law* (Oxford; Clarendon Press, 1981) 120
[58] Ibid 121

At this point Atiyah draws a distinction between what he calls, somewhat inconveniently from our perspective, the internal and external points of view. The use is somewhat inconvenient since Atiyah means these terms in neither of the two sense noted in this study, nor in the sense in which they have been made famous by HLA Hart. In Atiyah's use, these terms mark something like the distinction between agent-centred and agent-neutral perspectives on promise. Those who approach promise from the internal perspective think that the purpose of moral inquiry is to tell individuals what they should do in particular circumstances, to answer questions such as: What ought I do? Why should I keep my promise? Those who approach promise from the external perspective, by contrast, take the purpose of moral inquiry to be explain how people in general should behave, given the interests of the community of which they are members, to answer questions such as 'why should my community have an institution of promise at all? The internalist, then, takes morality to be, fundamentally an individual matter, while the externalist takes morality to be, fundamentally, a social phenomena.[60]

---

[59] Ibid 212

The point of this distinction becomes clear when Atiyah claims that "it is not possible to give a coherent explanation of why promises should be morally binding unless one first posits a social context, within the framework of which obligations arise."[61] Atiyah then insists that an adequate account of promise must adopt the external perspective. His principal argument here is essentially the same as that which moved Fried to adopt a conventionalist account of promise: Atiyah claims that many of the various detailed failings he has attributed to the alternative accounts of promise flow from their commitment the internal point of view. It is this commitment, according to Atiyah which generates the logical impasse of only being able to explain obligation once in possession of that very concept. For any theory, he maintains, there must be an initial allocation of entitlements, and that allocation must be made by communities. "[T]here is", he writes, "an inescapable initial decision to be made as to the relative entitlements of the promisor and the promisee, and that initial decision can only be made by society."[62] Atiyah finds some evidence for his claims here in the fact that promise is no longer regarded as a necessary or sufficient condition to contract-like obligation. There are circumstances in which though a promise has been given no obligation arises, and cases in which obligation arises without promise.[63] This shows, Atiyah claims, "a decline in the belief that an individual has a right to determine what obligations he is going to assume, and an increased strength in the belief that the social group has the right to impose its own solution on its members, dissent as they may."[64] Atiyah appears to suggest that this social determination of obligation is in practice made on broadly utilitarian grounds, which in the political sphere he takes to cash out as majoritarianism: "[M]ajority rule", he writes "is likely to to maximise the total utility of the group as a whole, and so it is for the benefit of the whole group that individual dissent should be overridden, so long as the group has a firm conviction to this effect."[65]

---

[60] Ibid 124

[61] Ibid 127

[62] Ibid 127

[63] It will be clear by now that the first case, which seems to show that promise is not *sufficient* for contractual obligation, is illustrated by 'consideration cases': There is no doubt the captain in *Stilk* v *Myrick* (1809) 2 Camp 317 *promised* to pay the sailors more money if they crewed the ship back to England, but no obligation arose since the sailors paid nothing (ie. gave no consideration) for the captain's promise. The standard commonwealth illustration of the second case , which seems to show that promise is not *necessary* for

It might seem that such an account leaves no role for individual assent in the determination of obligation at all. But Atiyah rejects this consequence. If one assumes even minimal rationality on the part of individuals, he remarks the fact of assent to an arrangement whether in political or contractual affairs, is *likely* to maximise utility. This is, however, far from inevitable: "Too many people have entered into too many foolish, unreasonable, unfair, and even unconscionable contracts in the past 150 years for any lawyer to doubt this."[66] So assent has an important, but not determinative function in decisions about obligation. Where there is assent it will often be the case that the grounds upon which the community does allocate obligation will be in place. Assent, then, has an important *evidential*

---

contractual obligation, is *Crabb* v *Arun District Council* [1975] Ch 179; [1975] 3 All ER 865 where the English Court of Appeal granted Crabb a right of access to his property from the council's adjacent road, because Crabb had rendered his property land-locked in reliance upon the council's intimations, which were held not to have amounted to promises, that he could have such access. The standard US illustration is *Hoffman* v *Red Owl Stores, Inc* 26 Wis 2d 683, 133 NW 2d 267 (1965) where the defendant's encouragement the Hoffman incur expenses in the expectation that he would be granted a Red Owl franchise was held to give rise to an obligation though it fell short of a promise.

[64] PS Atiyah *Promises, Morals, and the Law* (Oxford; Clarendon Press, 1981) 130

[65] Ibid 131

[66] Ibid

role in such determinations. But the determinations really turn upon the underlying reasons, which will win out if there it is clear that though there is assent those reasons for conferral of obligation do not obtain. Atiyah writes that:

> It could be said, then, that assent as a legitimating factor is evidentiary, rather than conclusive in its own right. It is because assent to arrangements is likely to maximise utility that it is so often an important justifying factor in law, morals, and politics. But if it is found that utility is not in fact maximised, then assent can be (and increasingly is) put aside as not in itself a sufficient factor.[67]

Atiyah claims that promise is a species of assent or consent. Just as the question whether or not consent generates obligation, then, turns not upon consent *per se*, but upon whether the underlying reasons for conferring such obligation obtain, so whether a promise generates obligation depends not just upon the promise, but instead upon the underlying reasons which bear upon the case. There is, indeed, no such thing as promissory obligation *per se*. Promises are admissions of obligations which obtain, if they do, because of reasons which are independent of the promise. So Atiyah writes that:

> ... the promise is evidence, is an admission, of the existence of some other obligation already owed by the promisor. By making an explicit promise, the promisor concedes or admits the existence and extent of the pre-existing obligation. ... [A]n implied promise is either an implied admission of the existence of a prior obligation, or it is merely a way of describing a situation in which such prior obligation arises even though there is no admission.[68]

These prior obligations, to which to promise or consent is to admit, may arise, Atiyah supposes, in many ways. In fact however where they are admitted by promise, "legal experience" suggests that they rely upon two principal sources. The relevant underlying obligations;

---

[67] Ibid

[68] Ibid 184

> ... arise, firstly because one person has done good, or rendered some benefit, to another; and secondly, because one person has done some harm to another, and in the context with which we are concerned, the type of harm which commonly arises is harm following some action (detrimental reliance) induced or encouraged by another person.[69]

The upshot of this is that while Atiyah and Fried agree that contract and promise admit of a common analysis, they offer strikingly different accounts of just what that analysis is. Atiyah supposes that contractual, and so promissory, obligation arises independently of and prior to contracts and promises. The obligation obtains, for the most part, because the community judges on broadly utilitarian grounds that inviting detrimental reliance or acquiring a benefit warrant the imposition of obligation. Contract and promise are common ways in which these prior and independent obligations are evidenced, and are not themselves independent sources of obligation. To find the source of the obligation which attaches in contractual and promissory contexts, then we must look "*through* the contract"[70] or promise to the prior and antecedent ground of obligation. Contractual and promissory obligation on Atiyah's account, then, is precisely what we have called *normatively externalist*. Charles Fried's account, by contrast, at least purported to be normatively internalist and content-independent. What mattered, according to Fried, was *that* a promise had been made. If it had, the obligation attached to or derived from that promise itself and not from an independent source of contractual obligation. We looked *at* rather than *through* the promise to determine the incidence of such obligation.

---

[69] Ibid

[70] Michael Sandel *Liberalism and the Limits of Justice* (Cambridge University Press; Cambridge, 1982) 107

Before moving on to to a critical assessment of Atiyah's account, it will be worth noting how this fundamental difference leads Fried and Atiyah to take opposing positions with respect to specific aspects of contract doctrine. We have seen that the doctrine of consideration has commonly been taken to pose the most serious descriptive challenge to the promise theory of contract: if it is the promise which grounds contractual obligation, and it is possible to promise to make a gift, why does the law of contract refuse to enforce such promises? Fried's response to this challenge was predictable enough. To the extent that the law of contract does refuse to enforce gratuitous promises, it is indeed inconsistent with the promise theory, but this refusal, manifest in the doctrine of consideration, is incoherent and should be abandoned. Atiyah's response is quite the opposite and evidences the extent of the differences between his account of promise and that advanced by Fried. Since Atiyah takes it that contractual and promissory obligation derives not from contracts and promises themselves, but from the underlying reliance or benefit based obligations they evidence, he is perfectly happy to embrace the doctrine of consideration. Promises alone create no obligation. They must be accompanied by some harm to the promisee or benefit to the promisor which allows the promisee to call upon the underlying obligation, evidenced through the promise or contract, and such harm or benefit is likely to be associated with a transfer of value such as the doctrine of consideration requires. So Atiyah is happy to identify the doctrine of consideration as a "profoundly moral doctrine, reflecting the belief ..., not merely that a promise *per se* should not be legally enforceable, but also that a promise *per se* was not morally binding."[71] So conceived, the doctrine identifies the circumstances in which an obligation to keep a contract does arise, and, Atiyah suggests (again consistently with the general strategy of giving priority to legal doctrine) that this is an argument which should recommend itself to promise theorists as well.[72]

---

[71] PS Atiyah *Promises, Morals, and the Law* (Oxford; Clarendon Press, 1981) 3-4

The second striking difference between the attitudes of Fried and Atiyah to contract doctrine concerns what Fried refers to as 'accidents around the contracting process'. These cases, on Fried's account, were marked precisely by the absence of the appropriate form of will or intention from which promise-based contractual obligation might be derived. Where justice called for a remedy, then, courts were obliged to 'fill the gap' by appeal to non-promissory principles. Since contract is promissory, remedies provided in this way are not contractual. As might be expected, Fried is anxious to minimise the incidence of such accidents; the greater the proportion of cases in which legal duties are imposed by gap filling, the smaller the role of a promise-based contract law. Atiyah, by contrast, supposes that contractual obligation *always* derives from the underlying principles of the kind to which Fried licences appeal only in cases of contractual or promissory failure. If it is true that sometimes we must 'look through the contract or promise' to discern the underlying grounds of obligation, then, according to Fried, the obligation we find will not be contractual since such obligation is internalist. According to Atiyah, on the other hand, we *always* have to look through the contract or promise to discern the grounds of obligation since contractual and promissory obligation *is* externalist. The difference between the two on this issue echoes the fundamentally different accounts they give of the nature of promise and its relation to contract.

---

[72] Ibid

We can usefully begin to assess Atiyah's argument by noting again how it bears upon the distinction between normative internalism and normative externalism upon which this study has relied. Atiyah, I suggested, could usefully be regarded as concerned to defend a normatively externalist account of contract. He maintains that whether or not a particular contract is binding depends not upon the contract itself, but upon the presence or absence of a set of underlying reasons for it being the case that parties are obliged to do as they have promised or contracted. Although Atiyah begins from idea that contract law has got these things right in a way and to an extent that promise theorists have not, he concedes that even within the institution of contract there are themes and cases which seem to trouble his account. For one thing, contract law takes it that mutual executory promises generate obligation. Indeed standard promissory definitions of contract speak of a contract as "a promise ... given by one person in exchange for the promise ... made by another person."[73] Contractual obligation arises upon the exchange of promises, prior to any performance whatsoever - prior, that is to the rendering of any benefit and prior to any reliance. Similarly, the doctrine of consideration requires that "[t]he act or promise of one party is, as it were, 'bought' or bargained for' by the act *or promise* of another."[74] Here contract treats a reciprocal promise itself as consideration. This seems inconsistent with Atiyah's view that the function of the doctrine of consideration is to ensure that contracts involve benefit or harm, and that promises are not in themselves either benefits of harms, but instead merely evidence these things. Since Atiyah thinks that the doctrine of consideration is connected directly to the occurrence of harm or benefit and that promises do not in themselves comprise either of these things, it is not clear how he can deal with the fact that the law takes promises to *be* consideration.

---

[73] GHL Fridman *The Law of Contract in Canada* (Carswell; Toronto, 1986) 1
[74] Ibid 75

Further, even if we accept the evidential analysis, Atiyah's account seems to be troubled by the tendency to treat contracts as *conclusive* evidence of obligation. Atiyah maintains that promises merely evidence underlying reasons for conferring obligation. To the extent that promises are taken to settle the matter, however, - to be *conclusive* evidence of the presence or absence of the appropriate underlying reasons - it might seem that they function as criteria of obligation and not merely as evidence. The underlying reasons may well be required in an explanation of why we have the criteria we do, but they will not feature in determinations of the propriety of finding obligation here and now. We can state this problem in the terms favoured by this study by saying that Atiyah must explain why it is that though contract and promise *seem* to be following a procedural approach to contract, insofar as they ask whether there has been a promise and take the answer to this question to be decisive, they are *really* following a substantive approach which calls for appeal to some set of underlying reasons which stand prior to and independently of procedural considerations.

Atiyah is aware of these difficulties. He offers two sorts of responses to the claim that the fact both law and morality do treat mutual executory promises as binding. First, he claims, we may make certain kinds of mistakes about the status of arrangements between people. In some of these cases the mistake flows from the observation of a common conjunction of promise and obligation: "It may be", he suggests, "that treating promises as binding where actual benefits were rendered to the promisor came gradually to have the effect of persuading people that promises always involved an obligation even if they were not rendered in exchange for benefits."[75] In other cases, the mistake is more complicated. Often what looks like a concluded promissory transaction is actually just an agreement on terms: *A* promises *B* at t_1 that if *B* does phi at t_2, *A* will pay *B* $100.00. We cannot conclude from this that *A* has promised, and so is obliged, to pay *B* $100.00. Suppose *B* could not have phi-ed at t_1 (phi-ing might be delivering a yet to be grown crop). Here the executory nature of the contract at t_1 is an indication not of the parties' intentions or preferences, but instead of their reaction to the impossibility of immediate performance. There may be various explanations for their decision to enter into an executory contract, other than a wish to give rise to a 'here and now' obligation, and it is not clear that all these other possible explanations will make it objectionable for *A* to change her mind prior to performance. Their agreement is not a concluded contract but merely an agreement on terms. And, of course, even where the facts of the case are such as to suggest that the parties did intend to generate an immediate obligation, such intention is not *on its own* sufficient to generate obligation as the critique of pure will theory has shown.

So, Atiyah maintains, though it may be true that 'current moral and legal codes' take promises to generate obligation, independently of reliance or benefit, they often do so because they make one or other of the two mistakes identified. At other times, however, Atiyah seems to suppose that the community might, in exercise of its power in these matters, determine that mutual executory promises *are* capable of generating obligation, and that, at least in some cases, there are likely to be good reasons for its doing so. One sort of reason it might have for doing so has to do with the desirability of risk-allocation. People enter into here and now obligations for future performance because that way they can allocate the risk of, for instance, an unfavourable market change, upon one party rather than the other. To the extent that allowing people to alter the 'natural' allocation of risk in this manner is of benefit to the community, it may be that the community has a reason to treat such contracts as binding. Other sorts of reasons have to do with protecting expectations (though this will only provide a very weak reason) and the idea that the strong cases for holding promises binding, where there *has* been reliance or benefit, will be best protected if we spread the net a little wide and enforce promises in which these elements are absent as well: "In order the better to ensure that relied-upon promises are performed, it may ... be desirable that even unrelied-upon promises are performed. ... A little over-shooting the mark is often a small price to pay for a greater number of shots actually on target."[76] Still other sorts of reasons obtain in those cases where, contrary to the general rule, mutual executory promises *are* mutually beneficial even prior to performance. If it happened to be true, for instance, that people were less inclined to change their mind about performing actions they had promised to perform than they were about those in respect of which they had made no promise, it might be a considerable advantage to be a party to an exchange of promises; "each party to a mutual executory contract has made an arrangement which is likely to bring him benefit."[77] From here Atiyah concludes that: "There is, therefore, a sense in which it is just as unfair to accept another's promise in return for one's own promise, and then break it, as it would be to accept the actual benefit of the performance of another's promise, and then to refuse to perform one's own return promise."[78] These last sorts of reasons, however, according to Atiyah, have force only so long as the institution of promise is firmly established, and so long as it is true that promises are very widely performed. Ultimately, then, Atiyah claims that when law or morality does treat contracts or promises as binding despite the absence of underlying reasons, they are either mistaken, or there are good reasons for it doing so.

---

[75] PS Atiyah *Promises, Morals, and the Law* (Oxford; Clarendon Press, 1981) 204

---

[76] Ibid 210-211

[77] Ibid 211

Atiyah also offers two responses to the problem posed by the fact that both law and morality tend to treat promises and contracts as *conclusive* evidence of the appropriatness of obligation. The first is an appeal to policy considerations: if we did not accept promises as conclusive admissions, we would have to inquire into the underlying reasons in every case, "[b]ut it is obvious a vast judiciary or bureaucracy would be required.... [I]f a person could not bind himself by a conclusive admission that what he says to another justifies the other in relying upon him a great many more disputes would inevitably arise which would need some sort of judicial resolution."[79] Atiyah's second response to explain the tendency to treat promises as conclusive evidence of obligation begins from something like the subjective theory of value.[80] Remember that Atiyah claims that promissory obligation really rests upon the notions of benefit and detrimental reliance. To assess the desirability of conferring obligation, we are concerned to assess the passage of detriment or benefit between the parties. If we hold to something like the subjective theory of value, we will think that individuals are *uniquely* able to make that assessment. Now we will have a reason to treat an admission of a certain valuation as conclusive proof that the transaction does indeed involve that value. Where the obligation turns upon the existence of such value, we will also have reason to find obligation: "[The]... admission can be taken as the very ground of his liability. By promising to pay for the benefit, he *admits* conclusively that it *is* a benefit. Since he is - within limits - the sole judge of these matters ..., his decision is final; he is liable *because* he has promised."[81] Atiyah's responses to the claim that the tendency of both law and morals to treat contracts or promises as conclusive, then, are all reasons why it might make sense for each of these endeavours to do so; it makes sense for law and morals to treat promises as conclusive, because it would be very expensive to do otherwise, and because in the end only individuals can assess the presence of the detriment or benefit which is really at the bottom of their obligation.

---

[78] Ibid 211

[79] Ibid 198

[80] See Chapter Two above.

I do not intend to consider the merits of Atiyah's arguments. No such consideration is necessary, since these arguments suffer a damning structural defect, such that the *better* they make their point, the more powerfully they work *against* Atiyah's position. To see this recall the argument for normative proceduralism offered in chapters four and five above. It was suggested there that Gallie's account of the essential contestedness of political and moral concepts was a reason to adopt a procedural approach to the determination of the propriety of particular applications of those concepts. The point was that our inability to settle the propriety of such applications by appeal to *substantive* reasons militated toward normative proceduralism. To the extent that we must settle the propriety of these applications, that we must do so either by appeal to procedural or substantive considerations, and that we are unable to do so by appeal to the latter, we have cause to embrace proceduralism. Atiyah's arguments, I believe are of the same form or structure. He goes to lengths to explain why we have reason to treat mutual executory promises as obligatory, or to treat promises as conclusive evidence of the presence of underlying reasons, but does not see that these very reasons are *reasons to be proceduralists*. They should convince us *not* that it is the underlying reasons which really matter, but that we have reason not to grant determinative status to these underlying reasons. We can add Atiyah's explanations for the practice of taking mutual executory promises to generate obligation and for the tendency of law and morals to treat promises and contracts as *conclusive* evidence of the existence of obligation, to the essential contestedness of moral and political concepts as reasons *in support of* normative proceduralism. The better Atiyah's arguments for accepting these practices as reasonable, the less reason we have to take his substantivist analysis seriously. Joseph Raz makes this point when he writes that Atiyah's reasons for holding some mutual executory promises as binding "does not depend on regarding them as admissions of independent obligations. They are reasons for holding that the promises themselves create obligations."[82] Atiyah denies this. He claims that the reasons he gives to explain why morals and the law treat mutual executory promises as obligatory do not undercut his general point that executory promises do not generate obligation. They give some explanation for certain cases, but, still, the "right conclusion is to recognize that we are prone to think of mutual executory promises as having a more binding character than is in truth warranted ...."[83] But we get only an assertion and no argument here. Insofar as we are convinced by Atiyah's arguments that there are some cases in which it is proper for the law to accept bare promises as obligatory and promises in general as conclusive evidence of obligation, we should be moved toward the appropriateness of a procedural approach to contract, for that is just what such an approach advocates.

---

[81] PS Atiyah *Promises, Morals, and the Law* (Oxford; Clarendon Press, 1981) 200

---

[82] Joseph Raz 'Book Review' (1982) 95 *Harvard Law Review* 916-938, 923

[83] PS Atiyah *Promises, Morals, and the Law* (Oxford; Clarendon Press, 1981) 212

We might reinforce this conclusion by recalling the argument offered in Chapter Two above for the claim that we should be wary of the classification of efficiency theories of contract as *externalist* or *standards-based.* The classification is motivated by the idea that such theories appeal to external standards of efficiency, so, we saw, Randy Barnett counts efficiency theories as standards-based, where standards-based theories "are those which evaluate *the substance* of a contractual transaction to see if it conforms to a standard of evaluation the theory specifies as primary."[84] I warned against this classification, since efficiency theories often adopt a subjective theory of value so that individual choices were determinative of efficiency - are, that is, *conclusive evidence* of presence or absence of the underlying reasons for obligation. Here external standards of efficiency function to explain why individual choice are given priority, but the test for efficiency is procedural or internalist. The *criterion* of efficiency, and so of obligation, is individual choice even though that criterion is adopted in order to promote an external standard. Given this, I suggested, efficiency theories should often be regarded as internalist and content-independent. The force of this earlier argument to the immediate discussion will perhaps be clear: Atiyah explicitly relies upon a subjective theory of value in explaining why it is sometimes a good idea to regard promises or contracts as conclusive evidence of obligation. He is right about that. But, again, that is a reason to think that we should be proceduralists rather than substantivists. Just as the subjective theory of value militated toward regarding efficiency theories as internalist and content-independent, so its role in Atiyah's argument shows that his account too is not an explanation of why, despite appearances, contract and promise are externalist and content-dependent, but instead an explanation of why these practices and institutions are internalist and content-independent. The point of this appeal to the significance of the subjective theory of value is that it is indicative of the general problem which undercuts Atiyah's attempts to explain why it is sometimes quite proper for morality and the law to regard promises as binding prior to reliance or benefit and as conclusive evidence of obligation. To the extent that they do indeed show this, they are arguments not for Atiyah's externalist content-dependent conception of contract, but instead for an internalist content-independent conception.

---

[84] Randy E Barnett 'A Consent Theory of Contract (1986) 86 *Columbia Law Review* 269-321, 277

In his review of *Promises, Morals, and Law* Joseph Raz claims that Atiyah's position here is directly inconsistent. Atiyah maintains that "moral rules and moral obligations are the creation of the social group ... [and therefore] it must be the group which ultimately decides what conditions justify the creation of moral obligation."[85] He grants as well that "[i]t is, of course, the case that current moral codes do treat mutual [executory] promises as morally binding, and that the law treats them as legally binding"[86] just as it is the case that both law and morality treat promises and contracts as conclusive evidence of obligation. Raz claims that the conjunction of these two remarks, the claim that the community determines what creates obligation, and the concession that the group has decided in favour of mutual executory promises and for the conclusiveness of promise and contract, means that "[t]here just is no room left, on his methodological assumptions, to claim that morally they are not, or should not be binding."[87] If it is up to the community, and the community says mutual executory promises are binding and promises are conclusive evidence of obligation, then that should be that should be the end of the matter.

---

[85] PS Atiyah *Promises, Morals, and the Law* (Oxford; Clarendon Press, 1981) 193-194
[86] Ibid 203

My suspicion is that while Raz's point is generally well taken, he puts it a little strongly when imputing a direct contradiction to Atiyah. It will suffice to say that it seems open to Atiyah to claim that his concern is to comment upon community practices, rather than to reject the determinative status he has granted to communities. The community can and must determine under what circumstances obligation obtains, but this is not to say that an individual cannot make recommendations to the community to make certain determinations rather than others. If this were Atiyah's role, he could avoid Raz's direct contradiction. The reasons he identifies as good reasons to regard mutual executory promises as binding and to regard promises and contracts as conclusive evidence of obligation, would, as was suggested above, now be reasons for the community to construct promissory and contractual institutions of a certain form. But, as noted above, this is to say that there is good reason to treat contractual and promissory obligation as internalist and content-independent. Construed so as to avoid Raz's contradiction, Atiyah's account works against the externalist content-dependent analysis of contract he purports to defend.

---

[87] Joseph Raz 'Book Review' (1982) 95 *Harvard Law Review* 916-938, 924

PAGINATION ERROR.

TEXT COMPLETE.

NATIONAL LIBRARY OF CANADA.
CANADIAN THESES SERVICE.

ERREUR DE PAGINATION.

LE TEXTE EST COMPLET.

BIBLIOTHEQUE NATIONALE DU CANADA.
SERVICE DES THESES CANADIENNES.

Chapter Nine

Contract as *Modus Vivendi* - A Review

In the opening chapter of this study I presented an overview of the liberal conception of contract and its critics. In this concluding chapter I want to retrace the path of that overview, indicating how the position defended in this study stands to the liberal conception and to the various strands of the critique. My hope is to show how the account of contract defended in this study is able to meet or defuse the principal strands of the critique of the liberal conception. In the second chapter of the study I introduced the principal theories of contract and suggested that they could usefully be regarded as tokens of one of two contract theory types. In this concluding chapter I will also attempt to show how the account of contract it defends is able to accommodate many of the virtues of these alternative theories while avoiding their vices. My aim then is to show how the account of contract defended in this study satisfies many of the desiderata which have motivated alternative theories, while avoiding many of the difficulties which seem to plague those theories.

We will usefully begin by outlining the thesis itself - by attempting to state just what the thesis has attempted to show and why. The thesis began by noting liberalism's historical and conceptual association with contract. Contractarian moral and political philosophy appeals to contract because contract seems to allow both obligation and respect for individual liberty. The idea here is that the limitations upon personal freedom which come with obligation are consistent with individual liberty when they arise precisely from the exercise of that liberty. Where liberalism is concerned with moral or political or social obligation, its appeal is for the most part to some form of *hypothetical* contract - the appeal is to a (liberal) *ideal* of contractual obligation rather than to any actual contract. But if that idea is to be at all plausible, it might seem that it should be readily identifiable in an institution which concerns itself with *actual* contracts. If the liberal idea of contract is to found anywhere, the idea goes, it ought to be found in the actual institution of contract law. The liberal conception of contract law may seem to be the institutional vindication of these ideological intuitions about contract. Here contract law is an institution the *raison d'etre* of which is the provision of opportunity for individuals to pursue voluntary choices. The law of contract serves liberal goals by facilitating the creation of legal obligations on any terms voluntarily chosen by individuals. Its various doctrines and rules are united in their common derivation from the liberal ideal that individual liberty is to be given priority; that *individuals* are the primary normative entity.

The event which gives rise to and determines the content of contractual obligation according to the liberal conception is the individual's choice to enter into legal relations with another on terms specified by the parties. From here we can see the thrust of a distinction upon which this study has relied, between internalist content-independent and externalist content-dependent conceptions of contract. The idea here was that some approaches to contract find the criteria by which the existence and extent of contractual obligation is to be determined in the act of contracting itself. Such approaches concern themselves with the conditions under which agreements are made - they ask, for instance, whether the act of agreement was free or coerced, whether the parties understood the contract, whether they 'really' agreed to its terms. To the extent that such approaches find the criteria of obligation in agreements themselves, they are internalist. On such approaches it does not matter what it is to which the parties have agreed. What matters is whether they have agreed or not. The approaches are concerned with the process by which the agreement arose and not with the content of the agreement itself. Whether the act of agreement was free or coerced, whether the parties understood the contract, whether the parties really agreed, will be settled by inquiring into the circumstances in which the agreement took place and not by inquiring into the content or substance of the agreement. These approaches, then, are content-independent. Other approaches, by contrast, claim that examination of the content of contracts is crucial to determinations of contractual obligation. According to these approaches contractual obligation is dependent upon it being the case that the content of a contract - what it is to which the parties have agreed - is consistent with a principle or standard of contractual obligation which stands independently of and prior to particular contracts. Such a standard, for instance, might require that the terms of the contract are fair to both parties, or that they satisfy an external standard of efficiency. If the transaction is unfair or inefficient by the lights of these external standards, no obligation will obtain notwithstanding that, from a procedural perspective, the parties 'really have' agreed. Such approaches are content-dependent and externalist.

I have made use of Michael Sandel's spatial metaphor to explicate the distinction between these approaches and we will usefully do so again: Sandel suggests that there are two approaches to determining the justice of an agreement, one founded upon what he calls the ideal of autonomy and the other upon what he calls the ideal of reciprocity. He writes this:

> Where autonomy points to the contract itself as the source of obligation, reciprocity points *through* the contract to an antecedent moral requirement to abide by fair arrangements, and thus implies an independent moral principle by which the fairness of an exchange may be assessed.[1]

I suggested that the principal theories of contract could usefully be regarded as tokens of one or the other of these two approaches to contract - such theories were either internalist and content-independent or externalist and content-dependent. Further, I suggested that the major conceptual challenges to the liberal conception could also usefully be understood in terms of the distinction between internalist content-independent and externalist content-dependent approaches to contract. I suggested, for instance, that Anthony Kronman's influential criticism of the liberal conception amounted to the claim that internal content-independent theories of contract inevitably collapsed into external content-dependent theories. There was, I portrayed Kronman as claiming, no stable internalist content-independent account. I went on to argue that Kronman's argument to this effect was fatally flawed: his argument ultimately relies upon the claim that liberal theories require a background theory of rights, but that no adequate theory is available since all the candidates involve essentially contested concepts. Since no adequate rights theory is available, Kronman claims, the liberal conception must ultimately appeal to an external standard of justice in contract. Liberals, then, according to Kronman, cannot give an internalist content-independent account of contract after all. All such accounts are ultimately externalist and content-dependent. I argued in response to Kronman that the essential contestedness of moral and political concepts did not militate toward external content-dependent theories of contract at all. Such theories require us to identify the substantive external principle upon which determinations of the existence and extent of contractual obligation depend. It is because these substantive concepts *are* essentially contested that we are driven to some other test. It is at this point that the idea of contract as a 'mere *modus vivendi*' was introduced. The idea was that the criteria for the determination of contractual obligation are selected as a way of getting by: As a way of settling issues which we would settle by appeal to external content-dependent standards if we could, but which we settle by internal content-independent standards because that is the only option available to us.

---

[1] Michael Sandel *Liberalism and the Limits of Justice* (Cambridge University Press; Cambridge, 1982) 107

It is sometimes claimed, and almost always implicitly assumed at this point, it seems to me, that the approach gestured at in the last sentence is still untenable. What I have called internalist content-independent accounts of contract are said to fall to a certain sort of dilemma: They either deny all role to substantive concerns, and thereby show themselves to be morally inadequate since they cannot recognise the great importance of those concerns, or they grant a role to substantive concerns and thereby show themselves to be substantivist, or externalist and content-dependent, *malgre lui*. Internalist content-independent accounts of contract are said to be damned if they do exclude appeal to substantive concerns and damned if they do not do so. I argued that this dilemma could be avoided. There are familiar examples from our every-day bag of concepts which show how we grant normative status according to internalist content-independent criteria, notwithstanding that we recognise the importance of externalist content-dependent concerns in the selection and evaluation of those criteria. The application conditions for terms such as 'married', 'divorced', and 'employed' are procedural notwithstanding that we would not have the procedures we have for their bestowal were it not that they stood to the relevant substantive concerns in a certain way. The authors of the dilemma are right then, in claiming that proceduralists must be able to give a place to substantive concerns, but they are wrong in supposing that this shows that proceduralists always turn out to be substantivists.

This response to the substantivist's dilemma connects with the general picture of contract as a *modus vivendi.* We settle on the procedures we have because we believe that they will promote or are consistent with the substantive concerns we take to be at issue. But, again, there is little reason to believe we are able to rely *directly* upon the relevant substantive concerns. Recognising that such reasons have a role to play, and recognising the constraints pluralism places upon that role, militates toward an account of contract as a *modus vivendi.* The criteria of contractual obligation we employ are intended to allow determinations of contractual status without direct appeal to the underlying substantive reasons for the conferral of such status, but in a way which is sensitive to the demands of such reasons. Once we appreciate the status of contractual criteria as *modus vivendi,* we should see that adopting them does not amount to saying that the underlying substantive reasons are trivial or nonexistent. We may be quite agnostic about their existence. We may regard such reasons as of the utmost importance. If we believe that we do not have access to them in decision making however, perhaps because Gallie is right about their essential contestedness, then we have reason to be proceduralists.

The arguments up to this point of the thesis, I claimed, showed substantivist theories of contract to be in serious difficulty. They require that we can specify external standards of obligation by which the content of contracts can be assessed, but there is little reason to suppose that such standards can be identified and defended. The essentially contested concepts doctrine, far from supporting substantivism seemed to provide compelling support for proceduralism. Further, once the status of procedural criteria as *modus vivendi* was appreciated, we could see that proceduralism did not entail the denial of the significance of substantive concerns. So conceived, contract was a particular attempt to protect and promote substantive concerns given our inability to specify the requirements of such concerns in a way which allowed them to fulfil a criteriological role in the application of the normative concepts of contract.

From here the thesis turned its attention to some specific theories of contract, and in particular to some principal liberal theories of contract. The hope was to specify the account of contract offered in the thesis a little more clearly by showing how it differed from those theories which may seem to pose a serious challenge to it, insofar as they were, ostensibly at least, theories of the right type.

I began with the will theory of contract, according to which acts of human will were to be valued in a way and to an extent such that their mere occurrence provided courts with reasons to enforce the 'content' of those acts of will. I suggested first that the distinction between instrumental and intrinsic versions of will theory could usefully be understood in terms of the discussion of procedural and substantive approaches to concept individuation advanced by this study. Just as substantive concerns motivate, without overriding, procedural systems, so instrumental systems seek to promote that toward which they are instruments while retaining determinative power. Though a 'full account' of some theory might require reference to substantive concerns, here associated with that valued ultimately or intrinsically or nonderivatively, still where the procedural system itself specifies the criteria for concept individuation, that theory is properly thought of as procedural. The analysis rests, again, on the idea that a clean break can be maintained between substantive and procedural concerns, notwithstanding that both must feature in a full account of a theory. Second, I argued that many critics of will theory moved illegitimately between two distinct notions of externalism, concluding from arguments for the implausibility of an epistemologically internalist contract that a normatively internalist institution was similarly implausible. The arguments for the former conclusion are powerful and do show pure will theory to be implausible. Those arguments are often taken to be a powerful objection to normative internalism in contract as well, but whatever their epistemological force they do not support this normative conclusion at all. Third, I used the discussion of will theory to introduce what I called the evidence objection; the claim that the arguments against an epistemologically internalist conception of contract showed only that the evidence for the presence of epistemologically internalist criteria, and not the criteria themselves, had to be epistemologically externalist. The objection, I claimed, was misconceived. In fact, for reasons made clear by Wittgenstein's private language argument and HLA Hart's observations about the application criteria for legal concepts such as consent, the view of language from which the evidence objection proceeds cannot be right. The application criteria for language *cannot be* private or epistemologically internalist in the way the evidence objection requires. Hart is right about legal practice and necessarily so.

In Chapter Seven, I turned to Randy Barnett's consent theory of contract. Barnett offers an account of contract for which I have a good deal of sympathy. Most of Barnett's analysis of contract theories turns upon a distinction between *standards-based* and *process-based* theories, more or less equivalent to that between external content-dependent and internal content-independent theories upon which this study has relied. Further, Barnett rejects standards-based theories on the grounds, among others, that such theories must and cannot identify and defend the appropriate external standard of obligation by appeal to which enforceable commitments are to distinguished from those which are unenforceable. This reason for rejecting standards-based theories is substantially equivalent to the appeal to the essentially contested concepts doctrine which anchored our rejection of external content-dependent contract theories. The apparent congruence between Barnett's account of contract and that defended in this thesis seems to continue when Barnett presents his positive theory. For the moment it will do to say this: Barnett takes it to be a major advantage of his consent theory of contract that it acknowledges the importance of the substantive values which must support and inform decisions about the form of contractual procedures. Barnett rejects what we can call 'pure proceduralism' because "... when the adopted procedures inevitably give rise to problems of fit between means and end, a process-based theory cannot say why this has occurred or what is to be done about it"[2], and because such theories cannot explain why certain *kinds* of contracts are not and should not be enforceable even where the process is followed; "[i]f ... agreements of these types are reached in conformity with all the "rules of the game," a theory which looks only to the rules of the game to decide issues of enforceability cannot say why such an otherwise 'proper' agreement should be unenforceable."[3] These difficulties are to be solved, according to Barnett, by paying proper regard to the moral theory which underlies and informs the procedures. The account defended by this thesis also takes proper regard to underlying or substantive reasons to be crucial - it too rejects pure proceduralism. But Barnett does so, I argued, at the cost of the procedural nature of his account. The claim was that in the end Barnett appeals directly to a controversial moral theory, so that this account is ultimately vulnerable to the same objection both he and this study run against substantivist or standards-based theories.

---

[2] Randy E. Barnett 'A Consent Theory of Contract' (1986)86 *Columbia Law Review* 289-290

In Chapter Eight the thesis turned to promise theories of contract. 'The' promise theory of contract, I remarked, was really a cluster of theories which ranged from the Kantian internalist theory of Charles Fried, through the 'mixed internal/external' theory of Joseph Raz, to the external admissions theory of Patrick Atiyah. I examined Fried's and Atiyah's theories in detail.

Fried's defence of the promise theory of contract has two parts. In the first he defends a general deontological conception of promise. In the second he examines contract doctrine arguing that his conception of promise is either able to account for that doctrine, or to show why those aspects of doctrine it does not seem able account for should be discarded. I argued that both of these aspects of Fried's treatment failed, since both relied directly upon a particular substantive moral theory for which Fried does not argue.

---

[3] Ibid

In connection with the defence of his general theory of promise, for instance, Fried claims that the convention of promise necessarily excludes consideration of reliance or utility. The idea is that promise flows from the need for Kantian agents to be able to trust one another if they are to maximise their capacity as such agents. The practice of promising gives trust its sharpest and most palpable form. But, I claimed, there is nothing in the notion of trust itself which excludes an account of promise which gives priority to reliance or utility. All that follows from Fried's account is that others may trust me to abide by the rules of promise *whatever those rules happen to be.* The rules of a particular institution of promise *might* exclude considerations of reliance or utility, but equally they might not. There is nothing in the trust based promise principle *per se* to settle this issue one way or the other. Fried does not consider this possibility, but it is easy enough to imagine what he might say. On Fried's account reliance and utility are excluded because he begins from a deontological moral theory. But now Fried makes the same error I have attributed to Barnett - he relies too directly upon a substantive moral theory, and that appeal at the level of legal institutions is illegitimate for the reasons set out above. Further, there seems to be no reason to suppose that the Kantian injunction to respect agents and their choices *does* require us to hold people bound 'to simply do as they have promised', as Fried suggests. We might better comply with that injunction by taking seriously a *subsequent choice* to renege upon an earlier promise. I concluded, then, that the general part of Fried's defence of the promise theory of contract was unsuccessful.

I went on to reach a similar conclusion about the specific part of that defence. Many of Fried's remarks about particular features of contract doctrine, such as consideration, rely upon a substantive moral starting point for which Fried does not argue, and which simply begs the question against his opponents. Fried argues that the doctrine of consideration is inconsistent, but his argument requires us to begin from a conception of contract which *makes* consideration inconsistent. Similarly, Fried seeks to supplement his promise theory of contract with a number of nonpromissory principles, among them principles of tort, restitution and 'sharing'. But Fried gives us no reason to believe that the supplementary or subservient status of these 'residual general principles of law' to the promise principle can be sustained. It is not clear why contract starts with the promise principle, and appeals only to these residual principles when the promise principle runs out, rather than the other way around, or rather than a system in which all of the principles are accorded the same antecedent level of priority. Again, Fried simply does not consider the problem, but again it is easy enough to see what he might say. Fried thinks the priority of the promise principle is guaranteed by the truth of the deontological moral theory from which he begins. We appeal to the promise principle because that is the principle which is generated by the Kantian injunctions to realise our capacities as rational agents and to respect the status of others as such agents. But, again, this direct appeal to moral theory at the level of legal doctrine is illegitimate. It is because we cannot determine specific doctrinal questions by appeal to substantive concerns that we have institutions such as contract. Some indication of the difficulty here is provided by the fact that Fried's account begs the question against those who do not agree with him about the proper (ie Kantian) starting point for contract and promissory theory. Fried has nothing to say to the very people he needs to convince, and this phenomena illustrates the general difficulty which militates toward procedural theories of contract. We simply do not agree on these matters, and that fact means that we need some other way of going on in the normative sphere.

From here the discussion moved to Patrick Atiyah's admissions theory, at the other end of the cluster of promise theories. According to Atiyah promises *per se* do not generate obligation. Indeed, in our society, the idea that it is up to individuals to choose the obligations to which they are subject has lost support: There has, writes Atiyah, been "a decline in the belief that an individual has a right to determine what obligations he is going to assume and an increased strength in the belief that the social group has the right to impose its own solution on its members, dissent as they may."[4] In practice, according to Atiyah, our society makes these determinations on broadly utilitarian grounds, and, in the contractual sphere, typically finds these grounds where 'one person has ... rendered some benefit ... [or] has done some harm to another" where "the type of harm which commonly arises is harm following some action (detrimental reliance) induced or encouraged by another."[5] Atiyah supposes, then, that contractual, and so promissory, obligation arises independently of and prior to contracts and promises. The obligation obtains, for the most part, because the community judges on broadly utilitarian grounds that inviting detrimental reliance or acquiring a benefit warrant the imposition of obligation. The importance of contracts and promises here is primarily evidential. Contract and promise are common ways in which the prior and independent obligations which obtain or not depending upon consequentialist considerations, are evidenced or admitted.

This account of contract leads Atiyah to offer a quite different account of contract doctrine from that favoured by Fried. Where Fried, for instance, rejects the doctrine of consideration, Atiyah hails it as a "profoundly moral doctrine": Insofar as the doctrine of consideration seems to require an exchange of value, it restricts the incidence of contractual obligation to cases where there has been benefit or harm. Where Fried thinks that promise is primary and resort to 'residual principles' permissible only where promise runs out, Atiyah thinks it is the residual principles which do the work. Promise for Fried is primary. For Atiyah it is merely evidence of underlying grounds for obligation.

---

[4] PS Atiyah *Promises, Morals, and the Law* (Oxford; Clarendon Press, 1981) 130
[5] Ibid 184

Atiyah acknowledges that his account is particularly troubled by two features of contract doctrine. The first is the practice of treating *mutual executory promises* as binding. Here there has been an exchange of promises, but no reliance and no harm. If it is the presence of benefit or harm which generates obligation, then, no obligation should be generated by such exchanges of promises. The second troubling aspect of doctrine is the tendency of contract to treat promise as *conclusive* evidence of obligation. When the law does so it might seem to treat promises not as *evidence* but as *criteria* of obligation. The practice of treating promises as conclusive evidence of obligation then seems to undercut Atiyah's evidential or admissions theory of obligation. Atiyah offers a number of arguments to explain why these features of doctrine do not show his account of contract to be false. At least some of those arguments amount the claim that at times it is after all proper for the community to judge that promises generate obligation independently of benefit or harm or that promises are conclusive evidence of obligation. The community, for instance, might wish to allow people to alter the 'natural' incidence of risk, and believe that the way to achieve this is to enforce mutual executory promises, or the community might believe that individuals are uniquely placed to judge whether they have benefited or been harmed, and so treat their admissions as conclusive evidence of such harm or benefit. None of these arguments, however, do the job Atiyah sets for them.

Ironically, indeed, the *better* they make their point the more powerfully they work *against* Atiyah's position. The arguments are designed to show why we have reason to treat mutual executory promises as obligatory, or to treat promises or conclusive evidence of the presence of underlying reasons. As such, however, they are arguments for proceduralism. The arguments should convince us not that it is the underlying reasons which really matter, but that we have reason not to grant determinative status to these underlying reasons. We can, I suggested, add Atiyah's explanations for the practice of taking mutual executory promises to generate obligation and for the tendency of law and morals to treat promises and contracts as conclusive evidence of the existence of obligation, to the essential contestedness of moral and political concepts as reasons in support of normative proceduralism.

The study, then, has been concerned to present an account of contract as a *modus vivendi* and to show how that account allows us to satisfy both our belief in the importance of substantive concerns in determinations of contractual obligation *and* our need to make such determinations given that we cannot do so by direct appeal to such substantive concerns. In the remainder of this chapter, I want to say in more detail just what consequences and advantages flow from a move to such a conception of contract.

Note for a start that to the extent that it is accepted, the move to an account of contract as a *modus vivendi* removes a large part of the *motivation* for the critique of internalist content-independent accounts of contract. We saw this feature of the account in our discussion in Chapter Five of the relation between procedural and substantive approaches to the individuation of normative concepts. That discussion was structured around a dilemma which I suggested was central to much of the critique of proceduralism. One horn of the dilemma amounted to the claim that proceduralists were unable to take the sorts of substantive concerns which are at issue in law seriously. The idea is that the possession of normative status may be very important - it may matter a great deal whether or not a particular transaction counts as contractual. If proceduralists say that normative status can be conferred regardless of the existence or quality of the underlying substantive reasons for such conferral - if all that matters is that the procedures are followed or satisfied - then the importance of normative status is threatened. The importance of normative status is said to be threatened by the idea that it can be effectively conferred for any reason whatsoever, or for no reason whatsoever.[6] The other horn of the dilemma amounted to the claim that if proceduralists did recognise the importance of substantive concerns in the determination of normative status, they were shown by that recognition to be substantivists after all. But I argued proceduralists could avoid this collapse. Again, our ordinary bag of concepts contains examples in which normative status is determined procedurally, but in which the structure of the procedures reflects the substantive concerns we take to be at issue. I do not intend to repeat those arguments. The point for now is this: If the account of contract as a *modus vivendi does* allow us to recognise the importance of the relevant underlying substantive reasons, then we will not be warranted in rejecting the internalist content-independent account of contract which portrays it as a *modus vivendi* on the grounds set out in the first horn of the dilemma. The account of contract as a *modus vivendi* removes much of our motivation for rejecting internalist content-independent accounts of contract.

Second, once we conceive of contract as a *modus vivendi* we should see I think that the justification of contract does not have to depend upon any one particular justification. It may be, given the commonalities that obtain between people and the circumstances in which they live, that their social institutions - the compromises they make - will also have much in common. But the conception of contract as a *modus vivendi* allows us to see how and why contracts might be defined and enforced for a variety of different reasons and purposes, whether political, social, or economic, which could vary from time to time and from community to community without any particular conception having a uniquely justifiable claim on the 'true' meaning of those terms, and without threatening the accuracy of an overall view of contract as a *modus vivendi*. One consequence of this feature of the account of contract as a *modus vivendi* is that the account seems to allow a response to the claims of commentators such as Hugh Collins and Patrick Atiyah that the clear change in contract doctrine over the past several decades shows *in and of itself* that we must have a new theory of contract. According to Collins "we must depart from traditional accounts" because contract has undergone "a double transformation both in form and content"[7] while Atiyah insists that a theory of promise must take account of the fact that "changing values have weakened, and in some areas quite destroyed, the belief in freedom of contract ...."[8] The common idea here is that doctrine and theory must stand in a particular relationship whereby the form of doctrine can be generated or explained or justified from a single theory. As there has been a change in community views about certain substantive matters - so contract doctrine must change, and so our theory of contract must change. It will not do, both Collins and Atiyah suppose, to defend a will theory of contract at a time at which the substantive values such a theory promotes have fallen from favour. In this they may be right. But the mistake is to have supposed that all of contract could ever be explained by appeal to a single substantive theory, and that holds for the substantive theories Collins and Atiyah opt for as well as it holds for the theories of their substantivist competitors. The account of contract as a *modus vivendi* avoids the difficulty at the outset, since it does not suppose that there is an unchanging unitary account of contract to be given. We construct our institutions in response to the substantive concerns we take to be at issue. The form of contract *is* likely to change over time and from community to community. Still the general account obtains.

---

[6] See above Chapter Five.

---

[7] Hugh Collins *The Law of Contract* (Weidenfeld & Nicholson; London, 1986) 21. Similar themes are to be found in Roberto Unger's *The Critical Legal Studies Movement* (Harvard University Press; Cambridge, Mass) and Duncan Kennedy's 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685-1778

[8] Patrick Atiyah *Promise, Morals, and Law* (Clarendon Press, Oxford, 1981) 215

The point here might usefully be put so:[9] Suppose we obtain a complete and accurate description of contract doctrine at a given time - let the time be that at which Sir George Jessup made his famous remark that "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."[10] Suppose further that Sir George was perfectly correct in his assessment of the political, moral, and legal principles of his day and that contract doctrine was at that time a perfectly faithful working out of these principles. Were we to explicate contract doctrine and principle as at the time of Sir George's remark, in the style of Dworkin's Hercules J, we might expect contract doctrine to be the faithful working out of those principles which comprise something like Kantian individualism. Now my claim is that *at best* this Herculean account can be no more than the record of the particular *modus vivendi* Sir George's community have struck upon. It is no more (and no less) than a historical record of a particular community's contractual compromise. It does not reveal the essence of contract law *per se*. Similarly, suppose that we carry out the Herculean exercise for contract doctrine and principle as at the time that Hugh Collins wrote his *The Law of Contract*, and suppose Collin's account to be just as accurate an account of the doctrine and principle of his time as Sir George's was of his. Here the Herculean explication will reveal contract doctrine to be the faithful working out of the communitarian principles of paternalism, fairness, and co-operation. But again, this explication will be no more (and no less) than a historical record of a particular *modus vivendi*. It too would fail to reveal the essence of contract. It shows only a particular contractual compromise. In each case, despite the changes in principle and doctrine and so in the form of the compromise, the account of contract as a *modus vivendi* remains intact.

---

[9] This form of presenting the point was suggested to me by Roger Shiner.

[10] *Printing and Numerical Registering Co.* v *Sampson* (1875) LR 19 Eq, 462, 465

These remarks connect to the overall thrust of this thesis. The thesis has presented a picture of contract doctrine as a *modus vivendi*, as a compromise given our inability to settle on the identity and requirement of the substantive principles which would, in some different more homogeneous world, determine contractual obligation directly. The examples allow us to see that in part the thesis is a defense of a *formal* account of the nature and function of rules or doctrine. Doctrine functions here as a 'level of agreement'. Though people disagree about the foundations, or explanations, or justifications, of doctrine, they are able to agree upon the form of doctrine. Joseph Raz defends an account of the nature and function of rules in practical reasoning which has just this structure. According to Raz, rules "mediate between deeper level considerations and concrete decisions. They provide an intermediate level of reasons to which one appeals in normal cases where the need for a decision arises."[11] Rules, Raz continues, can be justified by appeal to the "deeper concerns on which they are based"[12], but, he remarks, the advantages of relying upon rules rather than upon these deeper concerns in decision making are enormous. The most important of these advantages, according to Raz, is that:

> ... [T]he practice allows the creation of a pluralistic culture. for it enables people to unite in support of some 'low or medium' level generalizations despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or in Liberalism, etc. I am not suggesting that the differences in the foundations do not lead to differences in practice. the point is that an orderly community can exist only if it shares many practices, and that in all modern pluralist societies a great measure of toleration of vastly different outlooks is made possible by the fact that many of them enable the vast majority of the population to accept common standards of conduct.[13]

I take the account of the nature and function of doctrine defended in this thesis to be quite sympathetic to the sentiments expressed in this passage. The role of doctrine is to allow those who disagree at the level of substance to agree upon the application conditions for normative terms such as those of contract. An 'orderly community' requires such agreement. The point for now is that Raz is, here at least, giving a *formal* account of the function of rules - the account holds, if it holds, regardless of the content of rules, and regardless of the nature of the 'deeper concerns' which generate or underlie those rules. That is true as well for the project of this thesis. The thesis gives a formal account of the nature and role of contract doctrine. And it claims that this is the appropriate level for an account of the nature of contract. If that is correct, then we can see why those who suppose that they can explicate or reveal the essence of contract at the level of doctrine *or* at the level of principle are mistaken. No matter what the content of these two levels, a full account of that content does no more than provide a glimpse at the motivations to which particular communities have been subject and at the particular *modus vivendi* at which they have arrived.

---

[11] Joseph Raz *The Morality of Freedom* (Clarendon Press; Oxford, 1986) 58

[12] Ibid

[13] Ibid

This point leads us into a more general feature of the account of contract as a *modus vivendi*. The move to such a conception of contract seems to effect a significant change in the nature of the contract theorist's task. All of the contract theories we have examined, I have suggested, have been concerned to argue that their particular substantive starting point requires or explains or justifies a certain form of contractual institution. Charles Fried, for instance, rejects the doctrine of consideration because that doctrine is incoherent *given* the deontological promise theory from which Fried begins. Similarly, Fried re-categorises significant portions of what has traditionally been thought of as contract, placing them instead under a set of 'residual general principles of law', because those portions of contract doctrine are inconsistent with Fried's interpretation of the promise principle. For his part, Patrick Atiyah is concerned to 'explain away' those features of contract doctrine, such as the idea that mutual executory contracts generate obligation (which is inconsistent with Atiyah's starting assumption that such exchanges do not alter the underlying balance of reasons upon which obligation rests), and the fact that our system of contract appears to accept promises and contracts as criteria rather than evidence of obligation (when according to Atiyah, promises have *only* evidential significance).

Under a conception of contract as a *modus vivendi*, however, the contract theorist's task changes. Now the task is not to explain contract doctrine in terms of a unitary underlying moral theory. It is not to show how recalcitrant doctrine can be prodded or amended or explained away so that the body of doctrine as a whole conforms with an antecedent theory of obligation to which a particular theorist subscribes. Theorists need not follow Fried in rejecting or re-classifying large chunks of contract doctrine because they do not fit with some preferred account of contractual obligation, or Atiyah in offering *ad hoc* explanations for aspects of doctrine which seem to stand directly opposed to some general account. The contract theorist's task, instead, is to understand the institutional compromises which comprise our normative institutions - to understand why a community has settled on a particular form of contract doctrine (a particular institutional compromise) given the range of views on matters of substance which obtain in that community. The question, then, is 'why make some arrangements rather than others?' rather than 'what form of contractual institution can we have given our antecedent commitment to a substantive moral theory?'.

This change in the nature of the contract theorist's task is of fundamental significance. With it in mind we can begin to respond to many of the particular strands of the critique of the liberal conception of contract. When we outlined that critique, for instance, we began with the claim that the liberal conception was descriptively inadequate. The idea was that the liberal conception could not explain the actual law of contract. We referred in particular to the remedies available for breach of contract and to the doctrine of consideration. The actual law of contract regards expectation damages rather than specific performance as the primary remedy for breach, and even that remedy is subject to several limitations including a general duty to mitigate loss. Both of these features, it was suggested, sit ill with the liberal conception's commitment to the centrality of choice and consent to contract. The incongruence between theory and practice seems to be further exacerbated by the courts' increasing recourse to a reliance account of contract which leads on the one hand to a willingness to impose contractual obligation for what the liberal conception identifies as noncontractual undertakings, and on the other to an unwillingness to award damages beyond that figure necessary to compensate for reliance-loss, regardless of the extent of the defaulting party's undertaking. Subsequent discussion will have made the centrality of the doctrine of consideration to the critique clear; in refusing to enforce promises which are not supported by consideration, the claim goes, contract indicates that it is some characteristic of the passage of consideration which gives rise to contractual obligation rather than consent, promise, or their procedural equivalents.

The significance of the doctrine of consideration was particularly evident in our detailed discussion of the promise theory of contract. It is easy enough to see why. According to Charles Fried it is the *fact* that a promise has been made which generates contractual obligation. Fried runs directly into the consideration based critique then, since the doctrine of consideration seems to show precisely that the fact a promise has been made is *not* sufficient to generate contractual obligation. There must be both a promise and a purchase. Hence Fried's attempt to argue that the doctrine of consideration is internally inconsistent. By the same token, Patrick Atiyah embraces the doctrine of consideration since he is concerned to argue that promise is not an independent source of obligation, and since he takes that fact to be reflected in the requirement for consideration. Although Atiyah and Fried take opposing positions with respect to consideration, they share a common view about the nature of their task as contract theorists. Each aims to show how contract doctrine, properly understood, is consistent with their particular and prior conception of contractual obligation. It is its apparent inconsistency with the favoured theory which leads Fried to attempt to reject the doctrine and its apparent consistency with the favoured theory which leads Atiyah to argue for its coherence and centrality. I have argued that neither of these attempts to explain the doctrine of consideration in terms of the favoured theory is successful: Fried must simply assume that contract is deontological if he is to generate his contradiction and Atiyah must ignore the fact that often consideration does not require the passage of either benefit or harm.

Notice what happens, however, once we adopt a conception of contract as a mere *modus vivendi*. First, the force of that strand of the critique which alleges the descriptive inadequacy of the liberal conception seems to be largely negated. The conception of contract as a mere *modus vivendi* does not assert that contract doctrine derives from or is consistent with a unitary underlying moral theory. Instead it portrays the institution of contract as a way of getting by, a compromise, given precisely the absence of such a unitary theory. The claim here is just that consideration, for instance, troubles theories of contract such as Fried's and Atiyah's simply because they *do* argue from the perspective of a substantive underlying theory of contract. They take the contract theorist's task to be to explain and justify the totality of contract doctrine by the lights of a single theory. In rejecting this picture of the theorist's task, the conception of contract as a *modus vivendi* rejects the difficulty. When we see that contract is merely a *modus vivendi*, we see that there is no unitary underlying theory with which doctrine must be consistent, and we see that the allegation of descriptive inadequacy troubles only those theorists, such as Fried and Atiyah who do indeed advance an account of contract which appears to require such consistency.

The critical legal studies movement also objects to the attempt to explain all of contract in terms of a single underlying theory. Roberto Unger puts the objection, in typically flourishing form, so:

> To determine which part of established opinion about the meaning and applicability of legal rules you should reject, you need a background prescriptive theory of the relevant area of social practice .... This is where the trouble starts. No matter what the content of this background theory, it is, if taken seriously and pursued to its ultimate conclusions, unlikely to prove compatible with a broad range of the perceived understandings. ... [But] it would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. The many conflicts of interest and vision that lawmaking involves, fought out by countless minds and wills working at cross purposes, would have to be the vehicle of an immanent moral rationality whose message could be articulated by a single cohesive theory. The dominant legal theories in fact undertake this daring and implausible sanctification of the actual ....[14]

It will be clear that I take much of what Unger says here to be quite right. It is simply not a practical possibility that a group of individuals working in radically different temporal, geographical and social surroundings, with different views on just what the institution of contract should be seeking, responding to particular legislative concerns, or to the facts of particular cases, could cobble together a large and complex body of doctrine such as contract which was consistent internally, let alone with a single external standard of obligation. Given this, the contract theorist's task, as conceived by the likes of Randy Barnett, Charles Fried and all the other contract theorists who, I suggested were working, whether openly otherwise, to impose a single substantive explanation on contract doctrine, does indeed seem daring and implausible. Barnett, Fried, Atiyah and others suppose that plausible accounts of contract must begin from a particular moral theory. All such theories seem vulnerable to Unger's objection. Again, however, the objection just does not seem to bite against the account of contract defended in this study. The conception of contract as a *modus vivendi* does not suppose that there is a single unified substantive theory which will explain all of contract doctrine. The institution on this picture is a compromise; an attempt to find a structure on which advocates of quite different substantive positions might agree. There is, as Unger points out, little reason to believe that such compromises will generate an overall institution which manifests the sort of conceptual purity and consistency which Barnett and others seem to pursue.

---

[14] Roberto Unger *The Critical Legal Studies Movement* (Harvard University Press, Cambridge, Mass, 1983) 9

Unger's remarks are aimed at what we can call the 'lie of liberalism'. CLS, we have seen, attributes to liberalism the claim that the liberal political, moral, social and legal order is *uniquely* justified from first principles. Liberalism is portrayed as claiming that from an initial, and uncontroversial (since merely empirical), observation that humans are creatures of a certain type - namely free, choosing, rational planners - we can deduce, first, sets of principles on the basis of which such creatures would inevitable choose to have their communities ordered, and, second, detailed legal, moral and political doctrines such as the doctrines of the liberal conception of contract. The presence of competing principles within law, of the type documented in the opening chapter of this study and in far greater detail within CLS literature itself, shows according to CLS that the current structure is not necessitated by first principles at all. Rather it is *chosen* by those whose interests are served by that order. The claim that it is necessitated is intended, the critique maintains, precisely to disguise its contingency, to dissuade and discredit those who would seek its disintegration by presenting them as doing nothing less than opposing the natural and necessary way of things. Such is liberalism's 'daring and implausible sanctification of the actual'.

But the conception of contract as a mere *modus vivendi* attempts no such sanctification. It does not claim that the present order can be deduced from first principle, or that the present order is in any sense necessary, or uniquely legitimate. Indeed, the conception of contract as *modus vivendi* may be seen to take a good deal of the CLS critique on board. In the end CLS believes that legal doctrine is simply an expression of the extant power relations - those in power impose the legal order which serves their interest. CLS criticises the liberal tradition for seeking to disguise the fact that this order *is* simply chosen. Leaving aside the rhetoric in which CLS typically couches its allegations, the sorts of arguments presented against the dominant internalist content-independent theories of contract in this study should be seen to be sympathetic to the concerns which drive that critique. A central theme in the arguments against the likes of Fried, Barnett, and Atiyah was the idea that they did in fact rely upon direct appeals to substantive concerns. Just insofar as this is true, I maintained, they require determination of contractual status by appeal to substantive criteria. But unmediated substantive criteria cannot play this criteriological role. We may say then, that the account defended in this study is sympathetic to the claim we have associated with CLS, that an appeal to principles cannot provide law with the certainty and 'determinativeness' commonly sought by defenders of the liberal conception.

The account offered in this study, however, parts company with CLS as to the proper response to this phenomena. I associated one strand of CLS with Hugh Collins.[15] According to Collins, we have seen, contemporary contract must be understood as concerned to promote a particular set of substantive concerns, pursuant to which they seek to respect and foster the values of trust, paternalism and cooperation. Collins, then, argues that contemporary contract is externalist and content-dependent. Properly understood, he suggests, contractual obligation rests upon particular substantive values. His objection to liberalism is primarily that it has the underlying substantive values wrong, or at least that the underlying values of liberalism no longer obtain. I have argued that the kind of direct appeal to substantive values which Collins recommends is implausible. It is because of our inability to settle just what those substantive concerns require of us that we are driven to adopt procedural systems for the individuation of normative concepts. The approach defended in this study, then, parts company with that branch of the CLS critique which ends up advocating substantivist theories of contract.

---

[15] Hugh Collins *The Law of Contract* (Weidenfeld & Nicholson; London, 1986). See above Chapter One.

The other sort of response I associated with CLS was more purely negative or critical. Here the claim is simply that the presence of conflict both at the level of rules and at the level of principle and the absence of any meta-principle which might allow courts to derive determinative results to legal cases went to show that legal decisions were simply expressions of the personal preferences of judges. Again, the idea is that in asserting that the law is otherwise - in asserting that legal results are determined by the law, and not by judges intent upon protecting personal or class preferences, the liberal conception is concerned to undermine the claims of those who seek to challenge the existing order. Again, this is the lie of liberalism. How does the account of contract as a *modus vivendi* stand to this essentially negative strand of the CLS critique? We have seen that the account offers an *explanation* for the presence first of conflicting authorities - it provides an explanation, that is, for conflict at the level of doctrine such as I suggested was evident in the doctrine of mistake - and for the presence, second, of conflict at the level of principle. There *is* conflict at the level of principle, if by that we mean the level at which substantive concerns operate. It is the conflict, or disagreement, at that level which militates most strongly toward a conception of contract as a *modus vivendi*. And the conception of contract as a *modus vivendi* itself explains the presence of conflicting rules at the level of doctrine. Again, one would expect a body of doctrine cobbled together over time by individuals seeking to promote different substantive concerns and to strike compromises between different positions to contain at the very least internal tensions and fairly often downright inconsistencies.

Again however, the account of contract defended in this study resists the conclusions that advocates of that predominantly negative strand draw from the presence of conflict at the level of principle and doctrine. Part of the point of the argument against Kronman was to show how it was possible to defend a procedural account of contract. Despite the necessity of appeal to substantive concerns in structuring our legal institutions, we can, that argument attempted to show, individuate normative concepts without direct appeal to those substantive concerns. We are able to wield procedural terms even where an account of those procedures requires reference to substantive concerns. The account of contract defended in this study, then, parts company with the negative branch of CLS in claiming that despite the presence of conflict both at the level of doctrine and at the level of principle, still it is internalist, content-independent criteria which determine the propriety of particular applications of the concept of contractual obligation. In short, the account bites the radical theorists bullet, accepting that it is true that there are competing principles in contract but insisting that that is what leads us to settle on a conception of contract as a mere *modus vivendi* and maintaining that such a conception allows us to make internalist content-independent determinations of normative status.

I suggested above that the conception of contract as a *modus vivendi* posed a new question for contract theorists. If we take the form of contract doctrine to be a result of compromises between competing views as to the substantive matters at hand, we may take the theorist's question to be not 'how does the doctrine of, for instance, consideration cohere with a single overarching moral theory?', but instead 'why might we have an institution of contract which includes a doctrine of consideration?'. Part of the answer is to see the demands competing substantive perspectives make on our institutions. My claim is that we can see the imprint or trace of these demands upon consideration, and to that extent that doctrine bears out the conception of contract as a *modus vivendi.* We have perhaps said enough to show why those who conceive of contract as substantivist, as externalist and content-dependent, might seek an account of contract which contained a doctrine of consideration. The preference is clear in Atiyah's account of contract. I have suggested that we should regard Atiyah as concerned to defend an account which is both externalist and content-dependent. Atiyah approves of the doctrine of consideration, since, on his interpretation, it allows us to inquire into content of exchanges in order to determine the passage of benefit or harm. Similarly, the doctrine of consideration seems to sit easily with those who see contract as concerned to promote 'fair' exchanges. The idea here is that issues of fairness are more likely to arise where the victim of a breach of contract has suffered some loss or harm, such as a bargain or value based conception of consideration contemplates, than where they have suffered only the disappointment of not receiving the promised performance.

At the same time however, we can, I believe, see the results of the demands of a quite different set of substantive concerns. It will perhaps do to simply point to a feature of the doctrine of consideration to which we have already referred. In our law of contract, we have seen, promises themselves are capable of constituting consideration. This feature of consideration does not seem to sit easily with the substantivist's rationale. The fact that the law enforces mutually executory contracts, by treating promises themselves as consideration, seems to trouble those accounts of contract such as Atiyah's, which seek to make something of the fact that contract in requiring consideration thereby requires something 'in addition to promise' - namely, for Atiyah, the passage of some value which might amount to a harm or benefit. In the hands of those who take the theorist's task to be to show consistency with an overarching theory, this feature of contract doctrine is likely to be treated as evidence of the inadequacy of views of the likes of Atiyah. The account of contract as a *modus vivendi* prompts a somewhat different account. We can see, I think, why the proponents of views of contract such as Atiyah's and Fried's might compromise upon an institution which contained a doctrine of consideration very much like the one we have. In requiring, as a general matter, that enforceable contracts involve an exchange of value the doctrine satisfies at least some of the concerns of those who see the importance of consideration as being its selection of arrangements which threaten harm, or loss, or unfairness. In stipulating that promises themselves might count as consideration, the doctrine goes some way toward satisfying those who would prefer an account of contract which was entirely internalist and content-dependent. The claim then is that consideration, commonly taken to be an enormously troublesome doctrine for theories of contract, supports the conception of contract as a mere *modus vivendi*. Once we see that contract is an attempt to compromise between substantive concerns, we can see that why the doctrine of consideration is as it is. The conception of contract as a mere *modus vivendi* explains consideration and does so in a way which avoids the difficulties of attempting to enforce an antecedent theory of contractual obligation on doctrine. The claim here, then, is that under a conception of contract as a *modus vivendi* we can both avoid the force of much of the critique of the liberal conception, and also give a *better* account of the elements of actual doctrine than that available to competing theories.

The conception of contract as a *modus vivendi*, however, does not entirely reject or dismiss competing theories. One of its strengths is that it allows us to see why the various competing contract theories have stressed the aspects of contract which they have. A full account of the relation of the proffered account to each of the competing theories is too large a task to take on at this point in the study. The following very programmatic sketch will hopefully serve to indicate what such a full account would look like. In stressing the significance of pluralism, the conception goes some distance toward those who saw contract as essentially involving the acts of will of the contracting parties. The will theory, I suggested, was implausible insofar as it granted criteriological status to acts of will which could not function as public criteria of obligation. The conception of contract as a *modus vivendi* takes individuals and their choices to be significant, but it grants criteriological status not to acts of choice but to acts of choice mediated through public institutions. Contract as a *modus vivendi* similarly concedes the significance of those aspects of contract which are stressed by consent theories. The most sustained defence of consent theory, I argued, ultimately collapsed into substantivism and so was vulnerable to the same objection both its proponent and this study suggest rule out substantive approaches to contract. The account of contract as a *modus vivendi*, however, takes individual choices seriously in a way which is sympathetic to the concerns which drive consent theory. It matters, according to that account, that institutions are compromises between competing views as to matters of substance. The account of contract as a *modus vivendi* allows us to recognise the significance of consent or choice, albeit without giving consent itself determinative power. In our sketch of efficiency theories of contract I suggested that they could be viewed either as externalist or as internalist. As externalist theories, they pose external standards of efficiency by which the content of contracts are to be assessed. In this guise they fall to the general anti-externalism of this study. In their guise as internalist theories they specify that individual choices are themselves criteria of efficiency. One can easily see that concerns of efficiency *are* likely to require accommodating in an exchange institution such as contract, and there is no doubt that aspects of contract doctrine can be traced to such concerns. But there seems good reason to be suspicious of the ability of a 'bare choice' based theory to produce satisfactory normative institutions: In fact many people do not have the social or economic power to be counted under an efficiency or economic model. Some of the harsh results here, however, are likely to be mitigated by an institution which sees the economist's concerns as one of many to be accommodated in a dialogue between proponents of differing substantive perspectives. Again, the conception of contract as a *modus vivendi* may allow us to respect the intuitions which drive the economic account of contract while avoiding at least the worst of that approaches' excesses. I have already suggested above why we might expect an account of contract to require the presence of consideration in a way which accords with the bargain theory of contract. To the extent that the doctrine of consideration gives greater protection to exchanges of value, it reflects the common-sense view that such exchanges do typically pose greater threats to the parties than those which involve no such exchange. So stated, the account of contract as a *modus vivendi* allows us to recognise the substantive element of the doctrine of consideration; it allows us to see how the doctrine of consideration flows from substantive concerns about fairness, harm and reciprocity. Note that it also allows us to recognise the formal aspect of that doctrine. In its formal role consideration comprises a procedural test of agreement. Consideration is proposed as at least one of the criteria for the determination of contractual status. In this guise, consideration is of course consistent with the content-independent account of contract advocated in this study. Again, enough may have been said already to show why an institution of contract is likely to take account of reliance or the presence of reasonable expectations - people just are more likely to be harmed by breaches of contract upon which they have relied or in respect of which they have had disappointed expectations than by those from and in which they have expected and invested nothing. But we saw that the reliance and expectations theories of contract required some account of what was to count as *reasonable* reliance and *justified* expectation. The account of contract as a *modus vivendi* offers such an independent criteria. The application criteria for the terms 'reasonable' and 'justified' are to be stipulated procedurally, in a way which recognises the substantive concerns which leads to their presence *ab initio*, but which nonetheless does not rely directly upon those concerns. According to this approach it is not reliance or expectation *per se* which generates obligation. Instead, these phenomena generate obligation because and to the extent that we have structured our institutions so as to protect reliance and expectation in procedurally specified circumstances. Finally, relational and substantive fairness theories of contract each relied, in the end, upon the ability to employ substantive concerns as criteria of contractual obligation. I have of course maintained that such concerns cannot perform that function. But, again, the account of contract as a *modus vivendi* is able to cater to the sort of substantive concerns which drive the advocates of these theories. Institutional individuation of the normative terms of contract can reflect and foster substantive concerns, though, crucially, without becoming substantivist thereby. That was the force of the arguments in Chapters Four and Five above.

This study began with the suggestion that some approaches to contract law claim that the criteria by which the existence and extent of contractual obligation is to be determined reside within the act of contracting itself. Such approaches are *internalist* and *content-independent*. Other approaches claim that contractual obligation arises only where the content of a contract is consistent with a principle of contractual obligation which stands independently of and prior to particular contracts. Such approaches are *content-dependent* and *externalist*. The principal theories of contract are either internalist and content-independent or externalist and content-dependent. This thesis has been concerned to argue that externalist content-dependent theories of contract are implausible. It has been argued that contract should be conceived of as a *modus vivendi*: The criteria for the determination of contractual obligation are to be specified by communities as a way of settling issues which they would settle by appeal to external content-dependent standards if they could, but which they settle by internal content-independent standards because that is the only option available to them.

Once the status of contract as a *modus vivendi* is appreciated, it was suggested, we can see that many of the specific criticisms of internalist content-independent accounts of contract can be met. One such criticism, for instance, claims that internalist content-independent accounts cannot recognise the importance of the externalist concerns which are at issue in contractual adjudication. But the conception of contract as a *modus vivendi* is able to recognise the significance of such concerns, while retaining its status as internalist and content-independent. An immediate consequence of this feature of the conception is that it at once disarms many of the critics of internalist accounts of contract and removes much of the motivation for their critique.

A number of leading theories of contract have been examined in light of the distinction between internalist content-independent and externalist content-dependent conceptions of contract and the idea of contract as a modus *vivendi*. These perspectives show those theories to be inadequate. Though many common criticisms of will theory are misplaced, the theory relies upon an account of contractual language which cannot be sustained. Randy Barnett's consent theory of contract has much in common the account of contract defended in this study, but Barnett ends up relying too directly upon a underlying moral theory, so that this account is ultimately vulnerable to the same objection both he and this study run against externalist theories. Similarly Charles Fried's defence of the promise theory of contract relies directly upon a particular moral theory for which Fried does not argue. Patrick Atiyah's admissions theory of promise is externalist and content-dependent, but in order to meet objections to his theory based upon features of contract doctrine, Atiyah resorts to a number of arguments which in fact undercut his own position: they are arguments for an internalist content-independent account of contract.

The study, then, has been concerned to present an account of contract as a *modus vivendi* and to show how that account allows us to satisfy both our belief in the importance of externalist concerns in determinations of contractual obligation and our need to make such determinations given that we cannot do so by direct appeal to such externalist concerns. Adequate accounts of contract must be internalist and content-independent, and the most plausible internalist content-independent account is one which conceives of contract as a *modus vivendi*.

Bibliography

Alexander, Larry and William Wang, 'Natural Advantages and Contractual Justice' (1984) 3 *Law and Philosophy* 281-297

Altman, Andrew, 'Legal Realism, Critical Legal Studies, and Dworkin' (1986) 15 *Philosophy and Public Affairs* 205

Atiyah, PS, 'Review of *Contract as Promise*: '(1981) *Harvard Law Review* 509-528

Atiyah, PS, *Essays on Contract* (Oxford; Clarendon press, 1986)

Atiyah, PS, *Promises, Morals, and the Law* (Clarendon; Oxford, 1981)

Atiyah, PS, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979)

Barnett, Randy E, 'A Consent Theory of Contract' (1986) 86 *Columbia Law* 269-321

Bayles, Michael, 'The Purpose of Contract Law' (1983) 17 *Valparaiso University Law Review* 613

Beehler, Rodger, 'Waiting for the Rule of law' (1988) 38 *University of Toronto Law Review* 298-316

Benson, Peter, 'Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory' (1980) 10 *Cardozo Law Review* 1079

Bufnoir, *Propiete et Contrat* (2nd Ed. 1924) 487

Calabresi, Guido & Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089

Candlish, Stuart, 'The Real Private Language Argument' (1980) 55 *Philosophy* 85-94

Carver, Newton, 'Wittgenstein on Private Language' (1959-60) 20 *Philosophy and Phenomenological Research* 389-396

Cheshire and Fifoot *Law of Contract* 7th New Zealand edition (Wellington; Butterworths, 1988)

Coase, Ronald H, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1

Cohen, Morris, 'The Basis of Contract' (1933) 46 Harvard Law Review 553, 579

Coleman, Jules L, 'Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law' (1980) 68 *California Law Review* 221-249

Coleman, Jules L, see Murphy, Jeffrie G

Collins, Hugh,*The Law of Contract* (London; Wiedenfeld & Nicholson, 1986)

Cook, John W, 'Solipsism and Language' in A Ambrose and M Lazerowitz (eds) *Ludwig Wittgenstein: Philosophy and Language* (London; Allen and Unwin, 1972)

Coote, Brian, 'The Essence of Contract' (1988) 1 *Journal of Contract Law* 91-112 (Part I), 183-204 (Part II)

Dare, Tim, 'Raz, Exclusionary Reasons, and Legal Positivism' (1989) 8 *Eidos* 11-33

Davies, Stephen, 'Kripke, Crusoe and Wittgenstein' (1988) 66 *Australian Journal of Philosophy* 52-66

De Moor, Anne, 'Are Contracts Promises?' (1987) *Oxford Journal of Legal Studies* 103-124

Dewey, John, 'Logic, Method, and Law' (1924) 10 *Cornell Law Quarterly* 17

Dworkin, Ronald, *A Matter of Principle* (Harvard University Press, Cambridge, Mass., 1985)

Dworkin, Ronald, *Law's Empire* (Harvard University Press, Cambridge, Mass., 1986)

Dworkin, Ronald, *Taking Rights Seriously* (Harvard University Press, Cambridge, Mass., 1977)

Epstein, Richard, 'Unconscionability: A Critical Reappraisal' (1975) 18 *Journal of Law and Economics* 293

Feinberg, Joel and Hyman Gross, *Philosophy of Law* 3rd ed. (Wadsworth,1986)

Finnis, John, *Natural Law and Natural Rights* (Oxford; Clarendon Press, 1980)

Fridman, GHL, *The Law of Contract in Canada* (2nd Ed) (Carswell; Toronto, Calgary, Vancouver, 1986)

Fried, Charles, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press; Cambridge, Mass, 1981)

Fried, Charles, *Right and Wrong* (Harvard University Press; Cambridge, Mass, 1978)

Friedman, Lawrence M, *Contract Law in America* (University of Wisconsin Press; Madison and Milwaukee, 1965) 20

Fuller, Lon L and William R Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 52 (part 1)& 373 (part 2)

Fuller, Lon L, 'Consideration and Form' (1941) *Columbia Law Review* 799-824

Fuller, Lon L, *Anatomy of Law* (New York; Mentor, 1969)

Gallie, WB, 'Essentially Contested Concepts' (1956) 56 *Proc. Aristotelian Society* 167-198

Gilmore, Grant, *The Death of Contract* (Ohio State University Press, Columbus, 1974)

Goldberg, Victor, 'Toward an Expanded Economic Theory of Contract' [1976] 10 *Journal of Economic Issues* 45-61

Gray, John, 'On the Contestability of Social and Political Concepts' (1977) 5 *Political Theory* 331-348

Gray, John, 'Political Power, Social theory, and Essential Contestability' in *The Nature of Political Theory* edd. David Miller and Larry Siedentop (Clarendon press; Oxford, 1983) 75-101

Gross, Hyman, see Feinberg, Joel

Grotius, Hugo, *De Jure Belli ac Pacis* (1646) trans. F.W. Kelsey (Oxford; Clarendon press, 1925)

Harriman, *The Law of Contracts*, para 645 (2nd ed. 1901)

Hart, HLA, 'Legal and Moral Obligation' in *Essays in Moral Philosophy* ed. Melden (Seattle and London; 1958) 82-107

Hart, HLA, 'The Ascription of Responsibility and Rights' (1948-1949) 49 *Proceedings of the Aristotelian Society* 171-194

Hart, HLA, *Definition and Theory in Jurisprudence* (Clarendon Press; Oxford, 1953)

Hart, HLA,*The Concept of Law* (Oxford; Clarendon Press; 1961)

Hobbes, Thomas, *Leviathan* (1651) ed. CB Macpherson (Harmondsworth; Penguin Books, 1968)

Holland, TE, *Jurisprudence* (London; Clarendon Press, 1846)

Holmes, OW, *The Common Law* (London; MacMillan, 1882) 300

Howe, MD, *Justice Oliver Wendell Holmes: The Proving Years* (Belknap Pres; Cambridge, Mass., 1963)

Hume, David, *A Treatise of Human Nature*, Selby-Bigge edition (Oxford; Clarendon Press, 1978)

Hume, David, *An Enquiry Concerning the Principles of Morals* eds. T.H. Green and T.H. Grose (London: Longmans, Green and Co; 1875)

Hutchinson, Allan C and Patrick J Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 *Stanford Law Review* 199-245

Kant, Immanual, *Groundwork to the Metaphysic of Morals* trans. H.J. Paton, (NewYork; 1956)

Kennedy, Duncan 'Legal Education as Training for Hierarchy' in *The Politics of Law: A Progressive Critique* ed D. Kairys (1982) 48

Kennedy, Duncan, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685

Kenny, Anthony, 'Cartesian Solipsism' in G Pitcher (ed) *Wittgenstein* (London; MacMillan, 1971) 352-370

Kripke, Saul, *Wittgenstein on Rules and Private Language* (Oxford; Basil Blackwell, 1982)

Kronman, Anthony & Richard Posner, *The Economics of Contract Law* (Little, Brown and Co., Boston and Toronto, 1979)

Kronman, Anthony, 'A New Defender for the Will Theory' (1981) 91 *Yale Law Journal* 405-423

Kronman, Anthony, 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472-511

Kronman, Anthony, 'Specific Performance' (1978) *University of Chicago Law Review* 351

Leff, Arthur, 'Unconscionability and the Code - The Emperor's New Clause' (1967) 115 *University of Pennsylvania Law Review* 485.

Leff, Arthur, 'Unspeakable Ethics, Unnatural Law' [1979] Duke Law Review 1229

Lewis, David, *Convention: A Philosophical Study* (Cambridge, Mass; Harvard University Press, 1969)

Lightsey, Wallace, 'A Critique of the Promise Model of Contract (1984-1985) 26 *William and Mary Law Review* 45-73

Linzer, Peter, 'Uncontracts: Context, Contorts and the Relational Approach' [1988] *Annual Survey of American Law* 139-198

Llewellyn, Karl, 'Some Realism about Realism' (1931) *Harvard Law Review* 1222-1264

Locke, John, *Two Treatises on Government* (New American Library; New York, 1965)

Lucy, WNR, 'Contract Law as a Mechanism for Distributive Justice' (1989) 9 *Oxford Journal of Legal Studies* 132

Lukes, Steven, *Power: A Radical View* (London; Macmillan, 1974)

Macaulay, Stuart, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55-67

MacCormick, Neil, 'Voluntary Obligations and Normative Powers I' (1972) Supp. Vol. 46 *Proceedings of the Aristotelian Society* 59-78

MacIntyre, Alasdair, 'The Essential Contestability of Some Social Concepts' (1974) 84 *Ethics* 1-9

MacIntyre, Alasdair, *After Virtue* (London; Duckworth, 1981)

Macneil, Ian, 'Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neo-Classical, and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854-905

Macneil, Ian, 'Restatement (Second) of Contracts and Presentiation' (1974) 60 *Virginia Law Review* 589-610

Macneil, Ian, 'The Many Futures of Contract' (1974) 47 *Southern California Law Review* 691-816

Macneil, Ian, *Contracts: Exchange Transactions and Relations* 2nd ed. (Mineola; Foundation press, 1978)

Macneil, Ian, *The New Social Contract* (New Haven & London; Yale University Press, 1980)

Maine, Henry, *Ancient Law* (1864)

Marx, Karl, *Capital* (Moscow; Progress Publishers, 1954)

McTurnan, LB, 'An Approach to Common Mistake in English Law' (1963) 41 *Canadian Bar Review* 1

Melamed, Douglas, see Calabresi, Guido

Mill, John Stuart, *On Liberty* (London; Parker, 1859)

Mill, John Stuart,*Principles of Political Economy* (London; Longman, 1848)

Monahan, Patrick J, see Hutchinson, Allan C

Murphy, Jeffrie G and Jules L Coleman, *Philosophy of Law: An Introduction to Jurisprudence* (Revised Ed) (Boulder, San Francisco, and London; Westview Press, 1990)

Nozick, Robert, *Anarchy, State, and Utopia* (Oxford; Basil Blackwell, 1968)

Palmer, GE, *Mistake and Unjust Enrichment* (Ohio State University Press, Columbus, 1962)

Perdue, William R, see Fuller, Lon L

Pollock, Sir Frederick *Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* (London; Stevens, 1876)

Posner, R, see Kronman, Anthony

Posner, Richard, 'A Reply to Some Recent Criticism of the Efficiency Theory of Common Law' (1981) 9 *Hofstra Law Review* 775

Posner, Richard, 'A Theory of Negligence' (1972) 1 *Journal of Legal Studies* 29

Posner, Richard, 'Gratuitous Promises in Economics and Law' (1977) 6 *Journal of Legal Studies* 411

Posner, Richard, *Economic Analysis of Law* (Boston; Little, Brown, & Co., 1977)

Pothier, *Treatise on Obligations* (trans. W.D. Evans)

Pufendorf, Samuel, *De Jure Naturalae et Gentium* (1672) trans. C.H. & W.A. Oldfather (Oxford; Clarendon Press, 1934)

Rawls, John, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3

Rawls, John, *A Theory of Justice* (Harvard University Press; Cambridge, Mass., 1971)

Raz, Joseph 'Promises and Obligations' in *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Clarendon Press; Oxford, 1979)

Raz, Joseph 'Review of Atiyah' (1982) 95 *Harvard Law Review* 916-938

Raz, Joseph 'Voluntary Obligations and Normative Powers II' (1972) Supp. Vol. 46 *Proceedings of the Aristotelian Society* 79-101

Raz, Joseph *Practical Reasons and Norms* (Hutchinson; London, 1975)

Raz, Joseph *The Morality of Freedom* (Clarendon; Oxford University Press, 1986)

Richardson, Megan, 'Contract Law and Distributive Justice Revisited' (1990) *Legal Studies* 258-270

Rosseau, Jean-Jacques, *The Social Contract* (Penguin Books; Harmondsworth, 1968)

Sandel, Michael J, *Liberalism and the Limits of Justice* (Cambridge University Press; Cambridge, 1982)

Schwayder, DS, *The Stratification of Human Behaviour* (London; Routledge, & Keegan Paul, 1965)

Shepherd, Harold and Byron D Sher, *Law in Society: An Introduction to Freedom of Contract* (Brooklyn: Foundation Press, 1960)

Sher, Byron, see Shepherd, Harold

Simmons, John, *Moral Principles and Political Obligation* (Princeton University Press; Princeton, 1979)

Simpson, AWB, *A History of the Common Law of Contract* (Oxford University Press; Oxford, 1975)

Slade, CJ, 'The Myth of Mistake in the English Law (1954) 70 *Law Quarterly Review* 385

Smith, Adam, *Lectures on Jurisprudence* ed. Meek, Raphael, & Stein (Oxford; Clarendon Press, 1978)

Smith, Adam, *The Wealth of Nations* (1776)

Swanton, Christine, 'On the Contestability of Political Concepts' (1985) 95 *Ethics* 811-827

Taylor, Charles, *Hegel and Modern Society* (Cambridge; Cambridge University Press, 1979).

Unger, Roberto, *The Critical Legal Studies Movement* (Harvard University Press; Cambridge, Mass., 1983)

United States Restatement (Second) of Contracts (1979) von Savigny, Friedrich C, *Das Obligationenrecht* (1851) Book 2, Chapter 8

Wang, William, 'Reflections of Contract Law and Distributive Justice: A Reply to Kronman' (1982) 34 *Hastings Law Journal* 513-527

Wang, William, see Alexander, Larry

Weinrib, Ernest, 'Legal Formalism: On the Immanent Rationality of Law(1988) 97 *Yale Law Journal* 949

Winfield and Jolowicz on Tort (9th ed) (eds; Jolowicz, Ellis Lewis, and Harris) (Sweet and Maxwell, London, 1971)

Winfield on Tort (Sweet and Maxwell: London, 1937)

Wittgenstein, Ludwig, *Philosophical Investigations* (Oxford; Basil Blackwell, 1953)

Wollheim, Richard, *Art and Its Objects* 2nd Ed. (Cambridge University Press; Cambridge, 1980) 157-166

Wright, Lord, 'Ought the Doctrine of Consideration be Abolished from the Common Law' (1936) 49 *Harvard Law Review* 1225